Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

82-418

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH P. KATZ
DELSON & GORDON
230 Park Avenue
New York, New York 10169
(212) 661-9800

Counsel for Petitioner

QUESTIONS PRESENTED

In circumstances where the refusal to perform all work would be a "protected" economic strike, is a strike in the form of a refusal to perform only all overtime work "protected" or "unprotected"?

When during negotiations, after a collective bargaining agreement has expired, a union's members have voted to engage in an admittedly legal, partial economic strike by banning all overtime work, and where the union's membership has also voted to establish a fine for violations of the overtime ban by fellow members, is it a violation of Section 8(b)(1)(A) of the National Labor Relations Act for the union thereafter to impose that fine on members who have been properly found to have broken the partial economic strike by performing overtime work?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Statement 2

Reasons for Granting the Writ 4

Important Federal Questions of First Impression Which Should be Settled by This Court 4

Need to Harmonize Basic Federal Labor Policies as Set Forth in the Same and in Separate Federal Statutes 18

Conclusion 23

Appendix A 1a-18a

Appendix B 19a-20a

Appendix C 21a-38a

Appendix D 39a-41a

TABLE OF AUTHORITIES

Cases: PAGE

Associated Home Builders of the Greater East Bay, Inc. v. NLRB, 352 F.2d 745 (9th Cir. 1965) 10, 11

Auto Workers, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) reh. den. 336 U.S. 970 (1949) 11, 14, 15, 16

Bay Counties District Council of Carpenters (Associated Home Builders of the Greater East Bay, Inc.), 145 NLRB 1775 (1964) 10

Booster Lodge No. 405, IAM v. NLRB, 412 U.S. 84 (1973) 8

Brady v. Local 551, Air Transport Division, TWU, 439 F.Supp. 1190 (USDC, SDNY 1977) 18

Carlson v. Green, 446 U.S. 14 (1980) 21

C.G. Conn., Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939).....11, 12, 13

Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015 (4th Cir. 1981) 12

First National Bank of Omaha v. NLRB, 413 F.2d 921 (8th Cir. 1969) 12

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)..... 12

Glasser v. NLRB, 395 F.2d 401 (2nd Cir. 1968).....16, 17

Home Box Office, Inc. v. Director's Guild of America, 539 F.2d 578 (USDC, SDNY 1982) 17

Honolulu Rapid Transit Company, Ltd., 110 NLRB 1806 (1954)..... 11

International Brotherhood of Boilermakers, etc. v. Hardeman, 401 U.S. 233 (1971) 6

PAGE

John Hancock Mutual Life Insurance Co., 236 NLRB 440 (1978) 9, 10

John S. Swift Company, Inc., 124 NLRB 394 (1959) ... 11

Kovacs v. Cooper, 336 U.S. 77 (1949) 21

Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 4, 5, 7, 11, 13, 14, 19

Navarro v. Gannon, 385 F.2d 512 (2nd Cir. 1967) 20

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 176 (1967) 6, 7, 18, 20

NLRB v. Boeing Company, 412 U.S. 67 (1973) 6, 8

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 6

NLRB v. Granite State Joint Board, Textile Workers Union of America, Local 1029, 409 U.S. 213 (1972) . 8

NLRB v. Industrial Union of Marine Shipbuilding Workers, 391 U.S. 418 (1968) 8

NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960) 4, 5, 7, 13, 14, 15, 19

NLRB v. John S. Swift Company, Inc., 277 F.2d 641 (7th Cir. 1960) 11, 12

NLRB v. Local 742, IUE, 519 F.2d 815 (6th Cir. 1975) . 13

NLRB v. Mackay Radio & Telegram Company, 304 U.S. 333 (1938) 6

Scofield v. NLRB, 394 U.S. 423 (1969) 5, 6, 8, 10

Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974) 15

United Steel Workers of America v. Sadlowski, (50 U.S. Law Week 4626, decided June 14, 1982) 6

PAGE

Valley City Furniture Company, 110 NLRB 85 (1954) .. 11

Vandeventer v. Local No. 513, Operating Engineers, 579 F.2d 1373 (8th Cir. 1978) 18

Constitution:

U.S. Constitution, Article I, § 8..... 18

Statutes:

28 U.S.C. § 1254(1) 2

Labor Management Relations Act, 29 USC § 141 et seq. 5, 18

29 USC § 142(2) 13

Labor Management Reporting and Disclosure Act,

29 USC § 401 et seq.....5, 8, 18, 19

29 USC § 411 (a)(1) 20

29 USC § 411(a)(2)..... 8, 20

29 USC § 411(a)(4)..... 20

29 USC § 411(a)(5)..... 8, 20

29 USC § 529 ..... 8, 20

National Labor Relations Act, as amended, 29 USC § 151 et seq..... 5, 18

Section 7, 29 U.S.C. § 157 4

Section 8(b)(1)(A), 29 USC § 158(b)(1)(A) .....i, 2, 4, 5, 7, 8, 9, 10, 16, 17, 18, 20, 23

Other Authorities:

II NLRB, Legislative History of the Labor-Management Reporting Act of 1959 19

PAGE

Summers, *Democracy in Trade Unions*, The New Leader, February 10, 1958, p.7 21

Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022 (1976) 9

Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L.J. 1333 (1958) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner GAIU Local 13-B, Graphic Arts International Union (the "Union"), respondent in the proceeding below, respectfully prays that a writ of certiorari issue to review the judgment in this matter of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-18a) is officially reported at 682 F.2d 304. The decision and order of the National Labor Relations Board (App. C, infra, 21a-38a) are reported at 252 N.L.R.B. 936.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra, 19a-20a) was entered on June 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(A) is:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

The relevant parts of other statutory provisions, the consideration of which is necessary and appropriate, but whose construction is not directly involved, are set forth in Appendix D.

STATEMENT

The Union represents some 500 employees engaged in production and related activities at the Poughkeepsie, New York plant of Western Publishing Co., Inc. (the "Employer"), a publisher of books and similar materials. The Employer also has plants in Wisconsin and Missouri. Following the expiration on May 16, 1978[1] of the collective bargaining agreement between the Employer and the Union, the parties continued to negotiate while the employees continued to work without a

---

1 All dates are in 1978.

contract. The employees were obligated under the terms of their employment to perform paid overtime work when assigned by the Employer.

On August 23 the Union accused the Employer of bargaining in bad faith and of attempting to undermine it,[2] and advised the Employer that it would seek "strike" authorization. A Union membership meeting was held on August 28 at which 320 out of a membership of 490 were present. The members did not vote for a full economic strike but, 220 to 100, they voted to adopt a rule, effective immediately, prohibiting members from performing all overtime work. All employees were notified in writing of the overtime ban, and the Employer was notified in writing of the Union's position that "any disciplinary action and/or discharge of any member of Local 13-B for the observance of [the overtime ban] shall be considered an action taken against all of the members and will be treated by the Local as a lock out."

At a subsequent Union membership meeting the members voted to impose a fine as discipline on any member who thereafter worked overtime in violation of the Union's partial economic strike.

The Employer never agreed to the overtime ban, but it discontinued the assignment of overtime for about two months and, at about the time that it decided to reassign overtime, the Employer wrote at least four times to its employees notifying them that it would not discipline them for refusing overtime work, asking them to work overtime despite the ban and to hold another Union vote to rescind the overtime ban, reminding them of the wages they had lost and were losing by complying with the ban, advising them of their right to resign from the Union and thereby to be free from any Union discipline for working overtime, assuring them of the legal

2 Complaints issued by Region 3 of the National Labor Relations Board (the "NLRB") on Union unfair labor practice charges thereafter brought against the Employer were disposed of by a settlement agreement.

protection of their jobs should they resign from the Union, and threatening them with the possibility of hiring replacements if that were needed.

Thereafter at least 17 Union members worked overtime and through internal Union charges they were found to have acted against the Union's partial economic strike and were fined in accordance with the membership vote. Lawsuits were commenced against two members to effect collection of the fines.

A member who had been fined filed a complaint with the NLRB against the Union on December 6 charging that the enforcement by the Union of its internal rule requiring membership support of its partial economic strike was an unfair labor practice. After a hearing on the charge the Administrative Law Judge found no violation of law and recommended dismissal. The NLRB reversed. It first held that strike participants were "unprotected" because the ban on all overtime work was a partial, rather than a full economic strike. The NLRB then held that the proviso language of Section 8(b)(1)(A) did not govern because enforcement of discipline against a union member for refusing to engage in an unprotected activity coerced the member in violation of his Section 7, 29 USC § 157, right to refrain from concerted activities. The Court of Appeals enforced the order the NLRB.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

This case presents two important questions of federal law which have not been, but should be, settled by this Court.

This Court has recognized in its decisions the existence of precisely the first of these questions, but has refrained from passing on it in cases not requiring its determination, calling for "case-by-case adjudication". *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 ftnt. 14 (1976); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 492-493 and ftnt. 22 (1960).

This is the case for adjudication.

The second question has never been before this Court in the setting which this case presents. Although this Court has on numerous occasions responded to the need for explication of Section 8(b)(1)(A) and the built-in tension generated by the proviso thereto, this case presents the Court with an opportunity further to delineate this murky area and to refine the general language of its decision in *Scofield v. NLRB*, 394 U.S. 423 (1969).

It is important to settle the questions presented because they arise out of the exercise of a common, recurring economic weapon in the interplay of the economic forces which accompany collective bargaining. This Court has already found that a refusal to work overtime as a means of imposing economic pressure on a bargaining employer is not prohibited. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); see *NLRB v. Insurance Agents' International Union, supra.*

This case will determine some of the legal consequences flowing from the use of this tactic and, therefore, will significantly affect the frequency of its employment.

It is also important to settle the questions presented because it is necessary to harmonize three apparent differences in basic federal labor policy which this case presents.

> The judgment to which this petition is directed discourages the working of full, complete work weeks, except for overtime, and encourages full, complete strikes in apparent conflict with basic federal policy to protect interstate commerce from such interruptions. 29 U.S.C. §§ 141, 151, 401.
>
> The judgment to which this petition is directed injects the N.L.R.B. into the arena of economic warfare, by preferring one weapon over another, in apparent conflict with basic federal policy to abstain from such involvement. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

> The judgment to which this petition is directed injects the government into the internal affairs of labor unions in apparent conflict with basic federal policy which severely limits such intervention and which is designed to foster union responsibility through democratic membership participation. *NLRB v. Boeing Company*, 412 U.S. 67 (1973); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 176 (1967); see *United Steel Workers of America v. Sadlowski*, (50 U.S. Law Week 4626, decided June 14, 1982); *International Brotherhood of Boilermakers, etc. v. Hardeman*, 401 U.S. 233 (1971).

The position of the petitioner is that employees who engage in a partial economic strike by refusing to work all overtime should be afforded the same "protected" status as employees who engage in a full economic strike.

The position of the petitioner is that, even if such employees are not granted "protected" status, a union fine to discipline its own members for breaking a legal strike is not a violation of law.

The State of the Law With Respect to the Issue of Whether Employees Who Engage in A Partial Economic Strike By Refusing To Work All Overtime Are "Protected" or "Unprotected"

This Court has held that employees who engage in a full strike to enforce collective bargaining demands are entitled to certain protection, namely: the right to return to their jobs, if the jobs still exist, unless they were permanently replaced during the strike by other employees. *NLRB v. Mackay Radio & Telegram Company*, 304 U.S. 333 (1938). In its decision this Court explored the applicable legislative history.

This Court has held that employees who engage in certain types of strike conduct, such as a sit-down strike which violates the employer's property rights, are not entitled to protected status. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240

(1939). In its decision this Court explored the applicable legislative history.

This Court has recognized that there are many variations between a full, economic strike which is a "normal" and "traditional" weapon (*NLRB v. Insurance Agents' International Union* 361 U.S. 477, 495 (1960) and, for example, the sit-down strike. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra; NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 491-496 (1960).

One of the variants is a refusal to work all overtime. This Court, as noted, has held that a refusal to work overtime for the purpose of putting economic pressure on an employee is not prohibited or illegal. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976); see *NLRB v. Insurance Agents' International Union, supra.* In these decisions this Court explored the applicable legislative history.

But this Court has specifically left for further adjudication the question of the "protected" or "unprotected" status of partial economic strikers who refuse to work all overtime. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 152 ftnt. 14 (1976); *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 492-493 and ftnt. 22 (1960).

The actions of other courts and the NLRB on this issue will be presented and discussed in connection with the analysis of the Court of Appeals and NLRB decisions in this case.

The State of the Law With Respect To The Issue of Whether A Union Fine To Discipline a Member Who Breaks A Partial Economic Strike Violates Section 8(b)(1)(A) of the National Labor Relations Act.

This Court has held that a union fine to discipline a member who breaks a full economic strike does not violate Section 8(b)(1)(A). *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 176

(1967). In its decision this Court explored the legislative history of that provision as well as the applicable legislative history of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq., particularly 29 U.S.C. §§ 411(a)(2), 411(a)(5), 529.

This Court has held that union fines, though coercive in effect, do not violate Section 8(b)(1)(A) because of that characteristic. *NLRB v. Boeing Company,* 412 U.S. 67 (1973).

This Court has held that employees may avoid union discipline by the simple expedient of resigning their memberships and removing themselves from the union's authority. *Booster Lodge No. 405, IAM v. NLRB,* 412 U.S. 84 (1973); *NLRB v. Granite State Joint Board, Textile Workers Union of America, Local 1029,* 409 U.S. 213 (1972).

This Court has held that a union violates Section 8(b)(1)(A) where the union rule itself is contrary to the plain policy of the Act. *NLRB v. Industrial Union of Marine Shipbuilding Workers,* 391 U.S. 418 (1968) (depriving members of the right to complain to the NLRB without first exhausting intra-union channels).

Finally, this Court stated the general legal principle in this area in a case where it found that union discipline to enforce a rule establishing a production quota did not violate Section 8(b)(1)(A). In *Scofield v. NLRB,* 394 U.S. 423 (1969), this Court wrote at 394 U.S. p. 430:

> "Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. This view of the statute must be applied here."

Scofield gave rise to what has been called the "public policy exception". Six years ago a commentator was already lament-

ing "[t]he indefinite boundaries of such 'policy' exceptions" and wrote that:

> "without further clarification from the Court the contours of this public policy exception will remain vague. This is particularly unfortunate. The tension between union solidarity and individual rights is most marked during a strike. It is at this time that the individual union member is in the greatest need of clear definition of his rights and liabilities concerning nonconforming conduct."

Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1025, 1026 (1976).

This case provides the Court with the opportunity to sharpen the boundaries of the law and clarify rights and obligations.

The actions of other courts and of the NLRB on this issue will be presented and discussed in connection with the analysis of the Court of Appeals and NLRB decisions in this case.

ANALYSIS OF THE NATIONAL LABOR RELATIONS BOARD AND COURT OF APPEALS DECISIONS IN THIS CASE

Neither the two Member majority decision nor the concurring decision at the NLRB level follows this Court's injunction that the determinations required in this matter be adjudicated on a case-by-case basis. The approach of the NLRB was run-of-the-mill.

For example, at Appendix C (p. 27a) the NLRB writes:

> "It is well established that a union violates Section 8(b)(1)(A) of the Act if it disciplines members who refuse to engage in unprotected activity which would subject them to lawful discipline by their employer."

To support that proposition the NLRB cites only *John Hancock Mutual Life Insurance Co.*, 236 NLRB 440 (1978). The

case is miscited. The NLRB in *John Hancock* found that the union did *not* violate Section 8(b)(1)(A) writing:

> "We agree with the Administrative Law Judge that Respondent [the Union] did not violate Section 8(b)(1)(A) of the Act by threatening to discipline and actually initiating intraunion disciplinary proceedings against certain of its members because they refused to participate in union-sponsored 'luncheon demonstrations' ". 236 NLRB at p. 440.

In accordance with its decision the Board ordered that "the complaint be, and it hereby is, dismissed in its entirety." 236 NLRB at p. 441.

In support of its ultimate holding the NLRB cited only dictum in one case. This is hardly "well established" law.

Without so stating, the NLRB overruled its only other case in point: *Bay Counties District Council of Carpenters (Associated Home Builders of the Greater East Bay, Inc.),* 145 NLRB 1775 (1964). In *Bay Counties*, production quotas were set by union rule and were not agreed to by employers. 145 NLRB at 1780. Therefore, unlike the situation in *Scofield,* the employees were subject to employer discipline, including discharge, for conduct "contrary to the language in their collective bargaining agreements". 145 NLRB at 1780. The NLRB specifically stated, contrary to the expressions of the Trial Examiner, that the imposition of union fines for the breach by members of this rule was not a violation of Section 8(b)(1)(A) and fell within the proviso to that Section. 145 NLRB at 1776.

This ruling by the NLRB was reviewed at length by the Court of Appeals for the Ninth Circuit in *Associated Home Builders of the Greater East Bay, Inc. v. NLRB,* 352 F.2d 745 (9th Cir. 1965). *Associated Home Builders* is distinguishable from this case because the union rule there apparently required conduct in violation of collective bargaining agreements. In the instant case the union rule calls for conduct which is wholly legal. The court in *Associated Home Builders,* after a discus-

sion of the issue, declined to rule on it as a determination was unnecessary for the disposition of the case, 352 F.2d at p. 750-751; but unlike the decisions of the NLRB and the Court of Appeals in this case, the Ninth Circuit examined the legislative history as well as case law.

The NLRB likewise announced and supported its holding on the other issue presented by this petition (the protected or unprotected status of partial strike conduct) in one short sentence, without any reference to the statute or to legislative history and without any ratiocination. Where this Court and the Ninth Circuit were cautious and saw gradations, the NLRB proclaimed that the law was "clear" (App. C., p. 27a). In support of its proposition the NLRB cited two cases *John S. Swift Company, Inc.*, 124 NLRB 394 (1959) *enforced* 277 F.2d 641 (7th Cir., 1960) and *Honolulu Rapid Transit Company, Ltd.*, 110 NLRB 1806 (1954).

Honolulu Rapid Transit, supra, is notable for three things: it relied at 110 NLRB at 1810 on the decision of this Court in *Auto Workers, Local 232 v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), *reh. den.* 336 U.S. 970 (1949), which decision was overruled in *Lodge 76, IAM v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 152 (1976); it relied at 110 NLRB at 1810-1811 on *Valley City Furniture Company,* 110 NLRB 85 (1954), which decision the majority in this very case "consider incorrectly decided" (App. C., p. 28a, ftnt. 16); and it relied on *C.G. Conn, Ltd. v. NLRB,* 108 F.2d 390 (7th Cir. 1939), which decision is discussed below in the analysis of the Court of Appeals decision.

The NLRB in *John S. Swift Company, Inc., supra,* engaged in no statutory analysis, no review of the legislative history, no reasoning: it simply cited *C.G. Conn. Ltd. v. NLRB, supra,* and some other decisions. The Court of Appeals in *NLRB v. John S. Swift Company, Inc.*, 277 F.2d 641 (7th Cir. 1960) likewise, at p. 646, simply relied on *C.G. Conn. Ltd. v. NLRB, supra.* But on another matter of importance to this case the court spoke importantly. It held that employees who struck to protest the discharge of fellow employees who had complied with an overtime ban were protected and "enjoy statutory

protection as economic strikers". 277 F.2d at 646. The Union, here, threatened such action to protect its fellow members.

The decision of the Court of Appeals holds up no better to analysis. It, too, wholly failed to look closely at the statute; it ignored legislative history; it made statements concerning the law, but did not examine the particular economic facts as this Court did, for example, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Court of Appeals, as the NLRB, accepted as settled law that the status of the partial, economic striker is unprotected. It ignored this Court's prescription to proceed on a case-by-case basis and its statement that this was an open question.

The first case cited by the Court of Appeals, *Excavation-Construction, Inc. v. NLRB*, 660 F.2d 1015, 1020-21 (4th Cir. 1981) relied wholly on *C.G. Conn, supra.* It engaged in no independent analysis of the question of the status of partial, economic strikers who work a full work week except for overtime. The second case cited by the Court of Appeals, *First National Bank of Omaha v. NLRB*, 413 F.2d 921 (8th Cir. 1969) found that the employees had the status of economic strikers and were protected. The case may be cited only as dictum and, as most others, relied on *C.G. Conn, supra.*

The third and last case relied on by the Court of Appeals to support its holding that employees who refuse to perform overtime are unprotected is *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939). This is one of a few, if not the only, decision which explored the question rather than simply falling back on unexamined precedent. The first matter of note is that the court in *C.G. Conn* did *not* hold that employees who refuse only to work overtime are unprotected. After some exploration of the question it wrote at 108 F.2d at 398:

> "Because of the importance of the question presented, however, we are not satisfied that our ultimate conclusion be predicated upon the reasoning thus far employed. For the purpose of what follows, we shall assume the Board was correct in holding that a strike ensued, that there was no valid discharge of the employees and, that the relation of employer and employee remained undisturbed."

The second matter of note is that much of the Court's speculation on the question of the status of the employees depended on whether they could properly be considered "strikers". It found that the withholding of services limited to the refusal to perform overtime work was not a "strike" using the definition given in the *American and English Encyclopedia of Law,* Vol. 24. 180 F.2d at 396-397.

The Court in *C.G. Conn* was writing in 1939. It is now unquestioned that under federal law the withholding of labor limited to overtime hours is a "strike". 29 USC § 142(2); *NLRB v. Local 742, IUE,* 519 F.2d 815 (6th Cir. 1975).

Thus, the decision to which the petition is directed, despite this Court's clear concern with this question as evidenced in *Lodge 76, IAM v. Wisconsin Employment Relations Comm., supra,* and *NLRB v. Insurance Agents' International Union, supra,* simply relied on other decisions without independent reasoning or research. On analysis, two of those decisions are found to be dicta and the third relies on *C.G. Conn* which specifically eschews rendering a decision on the very question for which it is relied.

To the extent that the Court of Appeals explicated its decision, its reasoning is faulty. The court below wrote, at App. A, p. 8a, "To permit an employee in such a fashion unilaterally to dictate the terms and conditions of his employment could lead to chaos."

The above reason has already been examined by this Court and found to be "baseless". *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 496 ftnt. 28. This Court had no trouble in discerning that a refusal to work overtime to put economic pressure on an employer is not an attempt unilaterally to change the terms and conditions of work—it is a partial strike.

Moreover, instead of dealing with the facts of this case, on a case-by-case basis, the Court of Appeals spoke in general terms at App. A, p. 8a and visualized potential "chaos". The facts *of this case* provide no basis for such a conclusion.

Indeed, if we examine the relative merits of overtime bans, other economic weapons, and full strikes, we suggest that overtime bans should be preferred, not discouraged. In this connection it is instructive to look at the union conduct in *Insurance Agents'* and in *UAW, Local 232 v. Wisconsin Employment Relations Board* (Briggs-Stratton) 336 U.S. 249 (1949), which decision was overruled on an issue not relevant to this point in *Lodge 76, IAM v. WERC,* 427 U.S. 132, 152 (1976). In both *Insurance Agents'* and *Briggs-Stratton* this Court found that the union conduct was *not* proscribed by the National Labor Relations Act.

In *Insurance Agents'* the Supreme Court described the employees' conduct thusly at 361 U.S. 477, 480-81:

> ". . . the union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's 'May Policyholders' Month Campaign'; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in 'sit-in-mornings,' 'doing what comes naturally' and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions to the company at its home office while simultaneously engaging in mass demonstrations there."

In (Briggs-Stratton) the union, on twenty-six occasions between November 6, 1945 and March 22, 1946, called "meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning

to the employer or notice as to when or whether the employees would return." 336 U.S. 245, at p. 249.

It is important to distinguish the conduct of the unions in *Briggs-Stratton* and *Insurance Agents'* from the conduct of the Union in the instant case, because the effect of the former was to "put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments." 336 U.S. at p. 249.

It is again noted that the Supreme Court found that the union conduct in *Insurance Agents'* and *Briggs-Stratton* was not proscribed by the Act. However, it is this aspect of a union's conduct, i.e. the creation of a state of uncertainty which prevents dependable planning, which appears to underlie those decisions which label such conduct unprotected. For example, in *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), in a decision holding the employer to have committed unfair labor practices and finding the union action therein to be protected, the court wrote the following dictum at 497 F.2d P. 1203:

> "Unprotected activities closest to the facts in this case have generally involved situations where the employees have reported for work and, while receiving their usual wages, have repeatedly and without warning engaged in work stoppages, slowdowns or sit-ins. Such actions disrupt production schedules and impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages. Thus, they are unprotected because they make it impractical for the employer to operate his business properly."

The above reasoning flies directly counter to this Court's teaching that Congress saved economic tactics and devices from intervention just because they were especially effective (*Insurance Agents*, 361 U.S. 477, 496) or because they were not "traditional" or "normal" (*Insurance Agents*, 361 U.S. 477, 495), or because the employer "was disabled thereby from making any dependable production plans or delivery commit-

ments." (*UAW, L. 232 v. WERC*, 336 U.S. 245, 249). Nevertheless, even if it were the law, the Union conduct in this case would not be condemned. The Employer in this case knew, in advance, those hours which would not be worked. The Employer knew exactly how many working hours there would be to schedule, and exactly when those hours would be worked— a full work week would be worked without overtime. The employees would not receive wages for time not worked. Indeed, the Employer made a propaganda point of this. Replacement or temporary employees could be used. The Employer also made a propaganda point of this. Dependable production plans and delivery commitments could be made.

The livability of the overtime ban is made evident by the Employer's reaction to it in this case.

On the second question, whether the fine is a violation of Section 8(b)(1)(A), the Court of Appeals wholly failed to consider the question presented to it and to this Court, namely: whether the fine, even if the employee-members are unprotected, violates Section 8(b)(1)(A). This question was totally ignored; no legislative history was examined; and no consideration was given to the questions of federal labor policy, which questions must be addressed if there is to be an attempt to harmonize the various Congressional enactments in this field.

The Court of Appeals did not cite one case in point to support its conclusion that the imposition of the fine in this case violated Section 8(b)(1)(A). It simply bootstrapped itself to that position by cursorily finding that the employee-members were "unprotected" and then stating that the imposition of the union fine "is impermissable since it jeopardizes the members' employment relationships". (App. A., p. 10a).

The foregoing conclusion is especially surprising from the Court of Appeals for the Second Circuit as it appears to be directly in opposition to that court's decision in *Glasser v. NLRB*, 395 F.2d 401 (2nd Cir. 1968). In *Glasser* the NLRB found and held, and the Court of Appeals after consideration affirmed, that the enforcement by fines of a union rule

prohibiting a member from working with "suspended or expelled members or with nonmembers. . ." is not a violation of Section 8(b)(1)(A). There could hardly be a union rule which more directly "jeopardizes the members' employment relationships", yet the Court of Appeals for the Second Circuit wrote:

> "So far as Section 8(b)(1)(A) is concerned, we agree with the Board that the enforcement of this bylaw as against employee members of the Federation, even if restraint or coercion within the meaning of the statute, is nevertheless excepted from its prohibitions by the proviso that such prohibitions 'shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.' It was expressly so held with respect to a substantially identical bylaw in American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782, 787, 800-801 (7th Cir. 1951). See also Scofield v. NLRB, 393 F.2d 49 (7th Cir. March 5, 1968). And in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967), the Supreme Court has very recently held that Section 8(b)(1)(A) did not prevent a union from seeking court enforcement of fines levied against members who crossed the union's picket line during an authorized strike against their employer. In so ruling, the Court concluded that Congress, in enacting Section 8(b)(1)(A), did not intend "to interfere with union self-government or to regulate a union's internal affairs." Id. at 184, 87 S.Ct. at 2009. In light of the Supreme Court's construction of Section 8(b)(1)(A) in *Allis-Chalmers,* we conclude that the bylaw here in question is protected by the proviso to that section."

Accord, *Home Box Office, Inc. v. Director's Guild of America,* 531 F.2d 578, 602-603 (USDC, SDNY 1982).

Thus, the reason behind the ultimate holding by the Court of Appeals appears to be belied by its own decision and that of a court within its circuit.

THE NECESSITY OF HARMONIZING FEDERAL LABOR POLICY

The difficulty of relieving the tension produced by the language of Section 8(b)(1)(A) and the proviso thereto, and the interrelationships in the field of union discipline among federal statutory enactments have been remarked upon and explored by this and other courts. *NLRB v. Allis-Chalmers Mfg. Co.*, 338 U.S. 176 (1967) (NLRA and LMRDA); *Vandeventer v. Local No. 513, Operating Engineers*, 579 F.2d 1373, 1376-1379 (8th Cir. 1978) (LMRDA and NLRA, as amended by LMRA) and in *Brady v. Local 551, Air Transport Division, TWU*, 439 F. Supp. 1190, 1195-1196 (USDC, SDNY, 1977) (LMRDA and Railway Labor Act).

The decision of the court below raises some very troublesome questions of basic federal labor policy. It appears to run counter to three of the fundamental goals of such policy as enacted by Congress and as found and expounded by this Court.

The underpinning of federal legislation in this field is the Commerce Clause, U.S. Const. art. 1, § 8. Each of the three principal Acts of Congress in the field of labor-management relations declares as its principal purpose the elimination or reduction of burdens and obstructions to commerce. 29 U.S.C. §§ 141, 151, 401. Yet the decision to which this petition is directed discourages an economic weapon which is limited to the refusal to work only overtime hours while it encourages complete work stoppages.

Such result is not only counter to basic federal labor objectives, but also flies in the face of common sense. Even when a union believes that limited economic pressure will be sufficient, if effective, it will now be required to engage in an all-out strike if it desires to be able to enforce a rule against strike breaking. It was Senator Morse who, during the debates on the Labor-Manangement Reporting and Disclosure Act, 29 USC

§ 401, et. seq., said: "He is therefore forced to use an artillery shell to kill a mouse." II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1190 (1959).

The result produced by the decision of the court below appears in this regard, at least, to be absurd. If such a result is not compelled by the law, it should be avoided.

Another basic federal policy in this field is that the parties are to be left to their own devices, unless specifically restricted, in the spheres of collective bargaining and in the choice and application of the economic pressures which accompany such negotiations. Moreover, this general policy was found in the Act and in its legislature history in a case in which the NLRB was specifically directed by this Court not to inject itself into the sphere of collective bargaining by preferring one type of tactic to another in the contest of economic forces, *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

The effect of the decision of the court below is precisely what this Court found improper in *Insurance Agents'*. By holding that union discipline against strike breakers during a partial economic strike through the tactic of a refusal to work all overtime violates the Act, while reaffirming the legality of union discipline during a full economic strike, the NLRB is preferring one tactic over another.

Such intervention by the NLRB is particularly inappropriate in this case as this Court, in *Lodge 76, IAM v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 141 (1976) specifically stated that the Congressional intent was to permit the use of overtime bans as one of the tactics in "the free play of economic forces".

Thus, a consequence of the decision of the court below appears to run counter to another basic federal policy.

A third undergirding of federal labor policy is the determination to foster democracy in labor unions and to permit

unions, except where specifically restricted, to run their own affairs. This policy has found its most visible expression in the provisos to 29 USC §§ 158(b) (1)(A), 411(a)(1), 411(a)(2), and 411(a)(4). It is further found in the limited scope of 29 USC §§ 411(a)(5) and 529. The visible expression of that policy is reinforced in the legislative history, much of which was reviewed in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 176 (1967).

The federal policy in this area, as noted, is two-fold: it is to foster self-rule by union members as well as to keep the government out of internal union except as specifically invaded by statutory provision.

Thus, in *Allis-Chalmers, supra,* the Supreme Court quoted approvingly from Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L.J. 1333 (1958): "The majority-rule concept is today unquestionably at the center of our federal labor policy." 388 U.S. at p. 180.

The Court of Appeals for the Second Circuit, in *Navarro v. Gannon,* 385 F.2d 512 (2nd Cir. 1967), explored this policy of the federal labor law in another context and wrote: "The principle of union democracy encompasses, as Clyde Summers has said, 'the right to choose, even unwisely, [for] self-government is self-fulfillment.' " 385 F.2d at p. 519.

In this case we have in practice the democratic involvement and action which the courts have applauded and the law seeks to foster. Here the particular job action and the specific discipline were both determined by democratic votes of the membership. To intervene to set aside the Union's right to discipline its members in the very way that they have themselves decided, because the members voted not to work overtime rather than not to work at all, not only contravenes the members' right to determine their own destiny, but it chills membership participation if their actions are so susceptible to governmental veto.

The facts of this case provide a happy example of the soundness of the federal policy of non-intervention in both the areas of collective bargaining and the play of economic pressures attendant thereto and in the area of internal union affairs. It is the thesis of the petitioner that although the members have the right, as Professor Clyde Summers wrote "to choose even unwisely", Summers, *Democracy in Trade Unions,* The New Leader, February 10, 1958, p.7, the members of this Union in this case knew better than the NLRB how to protect themselves.

The NLRB and the court below have written of a legalistic status of "protected". The members of the Union, being in the real world and not in the world of legal theory, opted for what they saw as the more protected route. Justices of this Court have frequently noted that at times when the law looks only to itself it is dealing with an "unreality" and adopts "a formalistic procedural approach". *Carlson v. Green,* 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting); *Kovacs v. Cooper,* 336 U.S. 77, 89 (1949) reh. den. 336 U.S. 921 (1949) (Frankfurter, J., dissenting).

The written record before the court below in this case records the argument of the General Counsel of the NLRB in support of the proposition that the Union violates the Act by imposing discipline on a member for violating a rule which, he also agrued, left the member "unprotected". The argument reads, in material part, as follows:

> "When employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers—a status contemplating a risk of replacement and a loss of pay . . . employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing to perform all the work they were hired to do."

What kind of "protection" is there in "a risk of replacement and a loss of pay"? No wonder these Union members chose a limited action retaining their pay (*that* is economic protection)

and protecting themselves from discipline from their Employer by agreeing among themselves, and notifying the Employer, that discipline against a member for not working overtime would be considered a lock out. Thus, the members here provided for their own job protection while providing for their own economic protection.

Not only do union members prefer limited work actions with limited economic harm to themselves, rather than full strikes; so do employers. This very case, again, is a good example. The Employer, faced with an overtime ban, continued his operations. How, is his business; but the following options are open to employers generally: (1) farm out work to other plants in the same business enterprise where there is no labor action; (2) subcontract; (3) hire additional employees and do work within regular working hours; (4) accept most business from all customers, but turn away only that which would require overtime; (5) accept all business from favored customers and turn away marginal ones; (6) replace some employees permanently with non-Union member employees who will work overtime; (7) hire part time help to work after the plant's regular hours.

An employer can even accomplish for himself what the NLRB policy promotes: he can lock out his employees and shut down his business.

But employers rarely respond to an overtime ban-partial economic strike by a lock out. Indeed, no case has been found. There are major economic adantages in keeping a business going, even if it is not going at full speed. Among them are the continuity of customer contact, the maintenance of equipment in running order, and the relatively better profit and loss position. Maintaining the operation of the business enterprise, even without overtime, is advantageous particularly in view of the continuity of certain overhead costs such as debt service, rent, non-income taxes such as franchise and real property, and the need (usually met through continued payments) of retaining valuable non-bargaining unit employees such as salesman, executives, and certain clerical employees. Moreover, the em-

ployer knows that if he replaces employees who observe the overtime ban he may be inviting a full fledged strike.

Through the decision below, the federal government has injected itself into this interplay of economic forces assertedly to protect a union member from being disciplined for violation of a union policy which exposes him, the NLRB and the court below maintain, to the economic risks which attend an unprotected overtime ban so that he may be subject to the economic and job replacement risks, so baldly presented by the General Counsel, of a full economic strike.

If an employee wants the benefits, rights and privileges of union membership then, just as a citizen, he must accept the obligations and sacrifices which go with it. But what makes this governmental interference excessive, as well as statutorily unfounded and economically nonsensical, is that a union member has it in his hands to protect himself from union discipline. He may resign from the union.

Thus, even if this Court were to find a full overtime ban to be "unprotected" conduct, union discipline through fines against members who break such a partial, legal, economic strike is protected by the proviso to Section 8(b)(1)(A).

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Ralph P. Katz
Delson & Gordon
230 Park Avenue
New York, New York 10169
(212) 661-9800
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 680—August Term, 1981

(Argued March 3' 1982 Decided June 11, 1982)

Docket No. 81-4153

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Respondent.

Before:

.EINBERG, *Chief Judge,*
MANSFIELD, *Circuit Judge,*
MISHLER, *District Judge.**

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Petition for enforcement of an order of the National Labor Relations Board, 252 N.L.R.B. 936 (1980), directing the respondent Union to rescind its disciplinary action against 17 of its members for resisting its ban against their performing overtime work for their employer and to compensate them for losses suffered by reason of the ban. The Board found that the ban was an unfair labor practice in violation of § 8(b)(1)(A) of the National Labor Relations Act and was not adopted in response to alleged unfair labor practices on the part of the employer.

Enforcement granted.

RUAH D. LAHEY, Attorney, National Labor Relations Board, Washington, DC (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, DC, of counsel), *for Petitioner.*

RALPH P. KATZ, Esq., New York, NY (Delson & Gordon, New York, NY, of counsel), *for Respondent.*

MANSFIELD, *Circuit Judge:*

The National Labor Relations Board (the "Board") petitions pursuant to § 10(e) of the National Labor Rela-

tions Act (the "Act"), as amended, 29 U.S.C. §§ 151, *et seq.*, for enforcement of an order issued by it on September 20, 1980, against GAIU Local 13-B, Graphic Arts International Union (the "Union"), directing it to rescind its disciplinary action against 17 of its members because of their resistance to a Union ban against performing overtime work for the Western Publishing Co. (the "Employer"). The order also requires the Union to nullify its overtime ban, to compensate the disciplined members for losses suffered as a result of the ban, and to post appropriate notices. We enforce the Board's order.

The Union represents employees at the Employer's Poughkeepsie plant, which publishes books and similar materials, employing some 500 persons engaged in production and related activities, driving of in-plant equipment and janitorial services. Following the expiration on May 16, 1978, of the contract between the Employer and the Union the parties negotiated while the employees continued working without a contract. Under the terms of their employment the employees were obligated to perform paid overtime work when assigned by the Employer.

On July 14, 1978, the Employer advised 13 employees that they would be suspended for one day each because of their refusal to perform assigned mandatory overtime work but postponed putting the suspensions into effect. On August 28, 1978, the Union held a membership meeting at which 320 out of a total of 490 Union members were present. The members voted 220 for and 100 against adopting a work rule, effective at once, prohibiting members from performing mandatory overtime work. On August 30, 1978, the Employer responded by discontinuing overtime work. However, in October it reinstituted overtime to meet customers' needs, first ad-

vising employees that it did not intend to discipline employees who refused to work overtime but then returning to a mandatory overtime policy. Thereafter at least 17 employees who were Union members worked overtime in violation of the Union rule banning overtime.

On October 25, the Union began disciplining each of the 17 members through internal union charges, fines and lawsuits. A $50 fine was imposed on each of these employees for each day worked overtime. Also on October 25 the Union filed with the Board a complaint alleging that the Employer had committed unfair labor practices by failing to bargain with it in good faith and by improperly communicating directly with the employees.

On December 6, 1978, a unit employee who had been fined by the Union for violating its overtime ban filed a complaint with the Board against the Union charging that the ban was an unfair labor practice. On December 7, 1978, the Employer informed the Union that because of the bargaining impasse it would on December 11 put into effect the terms of its final contract offer but would not change the work hours to 37 1/2 hours per week, "[d]ue to [the Union's] continued threat of fines and discipline against employees who work in excess of 36 1/4 hours." On December 18, 1978, the Union filed a second unfair labor practice charge against the Employer, adding that it had unlawfully made unilateral changes in work conditions without a valid bargaining impasse. This was followed by a Union notice to its members on January 3, 1979, lifting the overtime ban but advising that if the Employer changed the existing 36 1/4-hour work week the ban would be reinstated immediately. The Employer then notified employees that it planned to put its proposed 37 1/2-hour work week into effect when the Union ended its threats of fines and discipline. After an un-

successful bargaining session on January 16, 1979, the Employer advised that it intended to implement the 37 1/2-hour work week on January 22, 1979, whereupon the Union advised that the ban was "back on."

The unfair labor practice charges filed by the Union against the Employer were settled by an agreement, approved by the Regional Director, between the Board's General Counsel and the Employer, in which the Union did not participate. The charges against the Union were heard by an Administrative Law Judge ("ALJ"), who found the Union's ban against overtime to be a lawful self-help response to the Employer's unfair labor practices allegedly committed during collective bargaining. Since the charges against the Employer had been settled the ALJ declined to hear evidence as to its commission of unfair labor practices. He did, however, admit testimony of the Union's recording secretary as to what was said at the meeting at which the ban was adopted but excluded various exhibits offered by the Union to prove that the Employer had engaged in unfair labor practices. Aside from the evidence of what transpired at the meeting the Union did not offer proof to show its reasons for adopting the ban.

A three-member Board panel reversed the ALJ's decision, holding that the ban had not been adopted in response to any unfair labor practices but "solely as a bargaining tactic, designed to put economic pressure on Western [Employer] and to force Western to make bargaining concessions. . . .", 252 N.L.R.B. 936, 938. It based its finding on a record showing that the Union had filed

> "no charges . . . against Western until almost 2 months after the overtime ban was implemented,

> that there is no evidence of any discussion at the August 28 union meeting characterizing Western's actions as unfair labor practices, that [the Union's] notice announcing the overtime ban makes no reference to Western's alleged unfair labor practices, and that the meager evidence as to the discussion at the August 28 union meeting indicates the employees were mainly concerned with Western's failure to reach an agreement with the Union quickly." *Id.*

The Board then concluded that the Union's disciplining of members who engaged in unprotected activity (i.e., refusal to perform mandatory overtime, for which they might lawfully be subjected to suspension or discharge by the Employer) violated "an overriding policy of the labor laws," *Scofield v. NLRB*, 394 U.S. 423, 429 (1969), and therefore constituted an unfair labor practice under § 8(b)(1)(A) of the Act. The Board order, which is the subject of the present petition, followed.

DISCUSSION

Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a union to "restrain or coerce" employee-members in the exercise of their rights under § 7, 29 U.S.C. § 157, which include the right to engage in or refrain from concerted activities, but § 8(b)(1)(A) preserves to the union the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." However, the latter proviso does not permit a union to adopt rules which are not in furtherance of a legitimate union interest or which are counter to an overriding policy of the labor laws, *Scofield v. NLRB*, 394 U.S. 423, 429, 430 (1969); *NLRB*

v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418, 424 (1968), such as finding a member for filing a charge with the Board, *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, supra*, 391 U.S. at 424, or for refusing to take part in conduct that violates the Act or the collective bargaining agreement, *Local 1104, Communications Workers of America v. NLRB*, 520 F.2d 411, 415 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *NLRB v. Communications Workers Local 1170*, 474 F.2d 778, 782 (2d Cir. 1972); *Stationary Engineers, Local 39, International Union of Operating Engineers*, 240 N.L.R.B. 1122, 1123 (1979). The "policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

In resolving the tension between a union's organizational rights and its members' exercise of rights guaranteed by § 7, the law allows a union to take disciplinary action against a member for refusing to engage in protected activity that will not jeopardize his job, see, e.g., *Scofield v. NLRB, supra* (adoption of piece work limits which would not entitle employer to discriminate against members obeying them), but does not allow it to do so because of a member's refusal to engage in conduct that is unlawful under the Act or that violates the collective bargaining agreement. *Local 1104, Communication Workers of America, supra; Stationary Engineers, Local 39, supra.* The issue before us here, however, is whether the Union may go further and punish a member for engaging in unprotected activity that violates neither the Act nor the collective bargaining agreement, in this case refusing to perform mandatory overtime work, which would jeopardize a member's job by entitling the Employer to terminate his employment and refuse to reinstate him.

Putting aside the prohibition of a no-strike clause, not involved here, a union may properly adopt rules disciplining members who refuse to engage in a full economic strike in which they do no work for the employer. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). Such strike activity is lawful and protected from being used as the grounds for punishment of striking employees by the employer, who must look elsewhere for substitutes and cannot deny the employees reinstatement upon termination of the strike, in absence of good cause. An employee who chooses to continue working but refuses to obey his employer's orders to perform activities forming a legitimate part of his work is not so protected. He is obligated to perform all of the work he was hired to do. To permit an employee in such a fashion unilaterally to dictate the terms and conditions of his employment could lead to chaos. An employer is entitled to receive from a person who opts for continued employment the full and undiluted performance of the duties for which he is hired and paid. The employee cannot have it both ways, i.e., continue to be employed but insist on working part-time as an economic weapon, any more than the employer would be permitted unilaterally to pay an employee less than the agreed upon wages for his services. See *Excavation-Construction, Inc. v. NLRB*, 660 F.2d 1015, 1020-22 (4th Cir. 1981); *Liberty Mutual Insurance Co. v. NLRB*, 592 F.2d 595, 604-06 (1st Cir. 1979); *Shelly & Anderson Furniture Manufacturing Co., Inc. v. NLRB*, 497 F.2d 1200, 1202-03 (9th Cir. 1974).[1] Applying

---

[1] There is one exception to the rule:

"The statutory protective shield extends to a *single* refusal to work overtime if it is a concerted activity directed at changing working conditions or employer policy." *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074, 1078 (5th Cir. 1979) (emphasis added); *see NLRB v. A.*

this rule, courts have uniformly held that a concerted refusal to perform overtime is an unprotected partial work stoppage. See, e.g., *Excavation-Construction, Inc. v. NLRB, supra,* 660 F.2d at 1020-22; *First National Bank of Omaha v. NLRB,* 413 F.2d 921, 925 (8th Cir. 1969); *C.G. Conn, Ltd. v. NLRB,* 108 F.2d 390, 397-98 (7th Cir. 1939).

A union rule requiring an employee to engage in such unprotected activity, even though adopted by a majority of the union's members, amounts to an unlawful restraint or coercion on its employee-members. It forces them, it they wish to continue working, to engage in unlawful activity and to risk being lawfully discharged by their employer or subjected to lawful imposition of disciplinary measures. An employee who engages in lawful strike activity retains his accrued rights, § 2(3) of the Act, 29 U.S.C. § 152(3), and is entitled to reinstatement upon conclusion of the strike unless the employer shows legitimate reasons to the contrary, *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967); *H. & F. Binch Co. Plant v. NLRB,* 456 F.2d 357, 364-65 (2d Cir. 1972); *The Laidlaw Corporation v. NLRB,* 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970). However, an employee discharged for misconduct in violation of the terms of his employment may be denied reinstatement, *Liberty Mutual Insurance Co. v. NLRB, supra,* 592 F.2d at 605-06; *NLRB v. John S. Swift Co.,* 277 F.2d 641, 646 (7th Cir. 1960). For these reasons, this type of economic coercion on the part of a union, forcing members to engage in

---

Lasaponara & Sons, Inc., 541 F.2d 992, 997-99 (2d Cir. 1976), *cert. denied,* 430 U.S. 914 (1977).

Since the Union's overtime ban was not a "one day" event, this exception does not apply.

unprotected activity, is impermissible since it jeopardizes the members' employment relationships, imperils their livelihood, and impairs our national labor policy. *Insurance Workers International Union,* 236 N.L.R.B. 440 (1978), see *Scofield v. NLRB, supra,* 394 U.S. at 428; *NLRB v. Boering Co.,* 412 U.S. 67, 73 (1973). Nor may such a union role be saved on the ground that the employee who wishes to avoid unprotected activity may leave the union and escape the rule. A rule which is inconsistent with our national labor policy must give way.

None of the Supreme Court decisions relied on by the Union supports its contentions that it may fine or discipline a member for refusal to engage in unprotected activity. In *NLRB v. Insurance Agents' International Union,* 361 U.S. 477 (1960), the Court merely held that unprotected union activity used as a form of economic pressure (e.g., work stoppages, " 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics," for which "the employer could have discharged or taken other appropriate disciplinary action against the employees," *id.* at 493-94) did not constitute a refusal to bargain in good faith in violation of § 8(b)(3) of the Act. The Court was not called upon to rule whether the union's disciplining of a member for not joining in such unprotected activity would violate § 8(b)(1)(A) of the Act, which is the issue here. In *Scofield, supra,* the piece-work ceiling could not have any adverse effect on the employment relationships of the employees with their employer, see 394 U.S. at 432-33; here the overtime ban would jeopardize their jobs. In *Lodge No. 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), the Court did not hold that the Act permits union disciplining of members for refusal to obey a union ban on overtime; it simply held

that regulation of the use of an overtime ban as an economic weapon was activity preempted to the Board under the Act and free of regulation by the states. Indeed, the Court then took pains to point out that it was not ruling on the question of whether the overtime ban there was "protected" under § 7, but confirmed that the employer would in any event have countervailing economic weapons available, including "discharg[ing] or tak[ing] other appropriate disciplinary action against the employees participating," *id.*, 427 U.S. at 152-53 & n.14. In *NLRB v. Boeing Co., supra,* 412 U.S. 67, the Court, in holding that the Board had no authority under the Act to rule on the reasonableness of union fines "not affecting the employer-employee relationship and not otherwise prohibited by the Act," *id.* at 73, reaffirmed the holding of *Scofield* that "the Board would have authority to pass on those rules affecting an individual's employment status but not on his union membership status," *id.* at 73-74.

Applying the foregoing principles here, it is clear that, unless justified as a defense to unlawful activity on the Employer's part, the Union's overtime ban violated § 8(b)(1)(A) of the Act. In the present case overtime, being mandatory and lawfully required, was an integral part of the employees' assigned duties and could not lawfully be rejected by them. The Union's rule banning overtime therefore jeopardized their employment relationship, since it would entitle the Employer to terminate them without reinstatement or take other disciplinary action against them.

The Union next contends that even if the ban would ordinarily be unlawful it was legally justified in this case as a response to general unfair labor practices allegedly committed by the Employer during the course of its collective bargaining with the Union. The Union relies on

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), which upheld employees' right to strike in response to their employer's unfair labor practice. The Board replies that *Mastro Plastics*, which involved "total" (and hence protected) strike activity on the part of employees, should not govern the present case, which grows out of unprotected "partial" strike activity not aimed at an employer's attempt to impose unlawful working conditions. We find it unnecessary to resolve this issue since the Board here made a finding, supported by substantial evidence, that the overtime ban was not adopted in response to the Employer's alleged unfair labor practices but solely as an economic weapon to improve the Union's bargaining position in on-going negotiations.

The Union's August 28, 1978 notice announcing the overtime ban made no mention of any conduct on the Employer's part that might amount to an unfair labor practice. Nor was there any evidence of discussion at the Union meeting on that date of any such unfair labor practice on the part of the Employer. In requiring that the employees work their agreed-upon mandatory overtime, the Employer was not attempting thereby unilaterally to impose a change in terms of employment over the protest of the Union or its members. The evidence, on the contrary, indicated that the members approved the ban because of dissatisfaction with the Employer's failure to reach an agreement promptly with the Union rather than because the Employer was doing anything unlawful.[2]

---

[2] The Union points to the following answer of its recording secretary, Phyllis Goodall, given in the course of her testimony before the ALJ, as evidence that it acted in retaliation for unfair labor practices on the part of the Employer:

"Q Can you tell us, at that meeting, what was said by certain members when they spoke on it [the ban]? Either for or against,

Moreover, the Union failed for almost two months after the August 28, 1978, meeting to file any unfair labor practices against the Employer, which supports the Board's inference that the August 28 ban represented a bargaining weapon. Otherwise the charges would have been filed immediately.

After the Board applied for enforcement of its order the Union filed with us in this proceeding a motion that the case be remanded to the Board for the taking of additional evidence which would allegedly support its defense that it promulgated the overtime ban in response to the Employer's alleged unfair labor practice. This relief, which the Board opposes, is sought on the ground that the ALJ, by erroneously precluding subjective evidence of the Union's purpose and excluding certain minutes of Union meetings and Union-Employer bargaining sessions, prevented or dissuaded it from proving the Employer's unfair labor practices and that Union members were motivated thereby to adopt the ban.

At the hearing on the Board's charges the ALJ initially ruled that the Union's intent in adopting the ban and disciplining its members for violation thereof was irrelevant. However, after the Board's General Counsel made out a prima facie case through documentary proof of the Union's adoption and implementation of the ban, the ALJ permitted the Union to introduce through Ms.

---

and if you can remember specific names of people who spoke? And if you can't, tell me you can't.

"A No, all I do remember is that they gave the same argument all the time in speaking about why we were working the company's overtime when they're, you know, were doing different things to the members. This was brought up continuously on the floor and at work."

However, this vague answer is hardly sufficient to call for rejection of the Board's findings made on the basis of other evidence.

Goodall, its recording secretary, testimony and exhibits showing what occurred at the August 28th special meeting of the Union at which the ban was adopted. The ALJ, advised of the Union's defense, indicated that he was aware of the unfair labor practices against the Employer, which had been settled, that he did not want a collateral trial of those charges, that he would admit objective evidence of facts with respect to the Union's defense, and that he would exclude a witness' "opinion and conclusions." The ALJ, although admitting the foregoing testimony and minutes of the August 28th meeting, excluded other documents claimed by the Union to show unfair labor practices by the Employer, including minutes of bargaining sessions and communications by the Employer to employees regarding bargaining proposals and the status of negotiations.

After introducing Ms. Goodall's testimony the Union rested without making any offer of the proof (other than the rejected minutes) which it wished to introduce to show motivation or unfair labor practices. Nor did the Union, upon the General Counsel's appeal to the Board, file any cross-exceptions to the ALJ's rulings, seek to reopen the record, or even contend that it would have offered any additional evidence other than that rejected by the ALJ even though the General Counsel contested the ALJ's finding that the ban was adopted as a response to employer unfair labor practices.

On the record before it the Board, in reversing the ALJ's finding that the ban was a permissible response to unfair labor practices, stated that under that theory a union must prove that unfair labor practices occurred, and therefore the ALJ had erred in not permitting the Union to litigate the alleged unfair labor practices by the Employer. However, it found that proof of the Em-

ployer's unfair labor practices would not have made any difference because the Union's ban had not been adopted in response thereto but "solely as a bargaining tactic." 252 N.L.R.B. at 938. Following the Board's decision, the Union did not seek leave to present additional evidence on the issues of motivation or unfair labor practices. Nor did it at any point indicate dissatisfaction with the ALJ's evidentiary rulings and exclusion of the minutes and letters offered by the Union. Indeed, the first time the Union sought to reopen the record to take additional evidence was on this appeal.

Section 10(e) of the Act, 29 U.S.C. § 160(e), provides that no objection not urged before the Board shall be considered by the court except where the failure to urge it is excused because of extraordinary circumstances. It further provides that the Board's findings when supported by substantial evidence shall be conclusive and that the court may on motion reopen the record to take additional material evidence upon a showing that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Board.[3] See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311-12 & n.10 (1979); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961);

---

3 Section 10(e) provides in pertinent part:

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946). The purpose of this provision is to insure against piecemeal appeals to the court by requiring the parties first to give the Board an opportunity to rule upon all material issues in a case. The Board has implemented this statutory policy by adopting regulations requiring the parties to raise by exceptions or cross-exceptions all issues they desire the Board to consider in reviewing an ALJ's decision. These regulations specifically provide that any exception "not specifically urged shall be deemed to have been waived," Board Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.46(b) and (h). In the present case the Union not only failed, upon being apprised of the ALJ's adverse rulings, to make a specific offer of proof (except as to the rejected minutes and letters), but failed to file any cross-exceptions with the Board after receiving the General Counsel's exceptions.

The Union argues that since it had prevailed before the ALJ it should be excused for not having filed timely cross-exceptions with the Board. This contention must be rejected, however, for the reason that the Union was put on notice of the possible importance of its evidence of motive and unfair labor practices by the General Counsel's exceptions taken to the ALJ's holdings that were favorable to the Union. Moreover, the Union could still have raised the evidentiary issues after learning of the Board's adverse decision by moving for reconsideration, rehearing or reopening of the record as it was permitted to do under § 10(d) of the Act and regulations promulgated thereunder, 29 C.F.R. § 102.48(d).[4] Having failed to

---

[4] Section 10(d) provides:

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set

bring the evidentiary errors "to the Board's attention through a petition for rehearing, it cannot assert [them] here on appeal," *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 203 (D.C. Cir. 1969). "Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Nor are we persuaded by the Union's argument that a motion before the Board for reconsideration or introduction of additional evidence would have been futile because most such motions are usually denied by the Board. It would be surprising to find that motions for reconsideration or reopening were not usually denied since in most cases the proferred evidence is not newly discovered but is immaterial or cumulative evidence that would not change the Board's decision. We cannot, however, accept the Union's contention that if it had, upon a motion to

---

aside, in whole or in part, any finding or order made or issued by it."

29 C.F.R. § 102.48(d)(1) provides:

"(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing."

the Board based on specific evidence showing that the result would be changed, the Board would have denied the motion. To accept this contention would be to assume that the Board's procedures for reconsideration are meaningless. This we cannot do. Here the Union at no time offered specific evidence on the issues of motivation other than the minutes and letters excluded by the ALJ. Our review of these documents merely reveals that the parties were locked in hard bargaining and that the ban, rather than constituting a reaction to unfair labor practices on the Employer's part, was adopted by the Union as an affirmative bargaining weapon. Lastly, to remand this case, which is now more than 3 1/2 years old, to the Board for further proceedings would only promote interminable delay without appreciable likelihood of any change in the result. There comes a time when further litigation of a case must stop and it has been reached here.

Accordingly the petition for enforcement of the Board's order is granted and the motion to remand the proceedings is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81-4153

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of June one thousand nine hundred and eighty-two

Present:

[Filed Jun 11 1982
A. Daniel Fusaro, Clerk]

HON. WILFRED FEINBERG, Ch.J.
HON. WALTER R. MANSFIELD, Circuit Judge
HON. JACOB MISHLER, District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Respondent.

A application for an enforcement of an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel,

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the application for enforcement of said order be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

IT IS FURTHER ORDERED that the respondents' motion to remand the proceedings to the National Labor Relations Board be and it hereby is DENIED.

A. Daniel Fusaro, Clerk

EDWARD J. GUARDARO
by Edward J. Guardaro,
Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 3—CB—3304

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION
(Western Publishing Co., Inc.)

and

ROBERT GREENE, an Individual

DECISION AND ORDER

On February 19, 1980, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in opposition to the exceptions of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that Respondent did not restrain and coerce employees in violation of Section 8(b)(1)(A) of the Act by instituting a ban prohibiting its members from performing mandatory overtime work and by attempting to enforce this ban through internal union charges, fines, and lawsuits. The Administrative Law Judge found that,

although the refusal of Respondent's members to work any mandatory overtime would normally be considered unprotected as a recurring or intermittent partial strike, such activity was protected in the circumstances of this case because it was in response to the Employer's alleged unfair labor practices. The Administrative Law Judge concluded that the members who complied with Respondent's overtime ban could not lawfully be disciplined by their Employer for engaging in such protected activity and that therefore Respondent had not restrained or coerced employees by disciplining its members who had worked overtime in violation of the ban. Contrary to the Administrative Law Judge and for the reasons set forth below, we find that the refusal of Respondent's members to work mandatory overtime was, in the circumstances of this case, an unprotected partial strike despite the alleged unfair labor practices of the Employer, and thus Respondent violated Section 8(b)(1)(A) of the Act by enforcing its overtime ban.

Background and Facts

Western Publishing Co., Inc.,[1] is engaged in the publishing of books and related items at its various facilities in Missouri, New York, and Wisconsin. The only facility involved in this case is Western's Poughkeepsie, New York, plant, where Respondent has represented the janitors, the inplant material handling equipment drivers, and the production and service employees in the baling operation and in the Binderies, Receiving, Shipping, Sheeting, and Paper Handling Departments since about 1952.

The following facts were stipulated by the parties at the hearing. The most recent collective-bargaining agreement between Western and Respondent expired on May 16, 1978.[2] Negotiations for a new contract began on April 7. About 40 bargaining sessions had been held by the time of the hearing on September 28, 1979, but no new agreement had been reached.

---

1 Herein called Western.

2 All dates herein are in 1978, unless otherwise indicated.

On July 14, Western gave 1-day suspensions to 15 employees because of their repeated refusals to perform mandatory overtime work.[3] On August 28, Respondent announced new "Work Rules" which stated:

1. No overtime shall be worked by any member of Local 13-B Poughkeepsie G.A.I.U.

2. Established shift and starting times in effect August 28, 1978 shall not be changed.

3. Failure to comply with these rules and any disciplinary action and/or discharge of any member of Local 13-B for the observance of these work rules shall be considered an action taken against all of the members and will be treated by the Local as a lock out.

By a letter dated August 30, Western notified its employees that, "Effective immediately, all overtime is discontinued. This action was taken in your best interests since it was reported to us that employees were being threatened with fines should they work any overtime."[4]

By a letter dated October 17, Western notified its employees that it intended to begin scheduling overtime again that weekend because of the needs of one of its largest customers; that although it had a legal right to discipline employees who refused to work overtime, it did not intend to do so; but that it did intend to accomplish the overtime work with nonunit employees if necessary. On October 21 Western reinstated its mandatory overtime policy, and after that time at least 17 unit

---

3 The suspensions are being held in abeyance by Western pending the resolution of this case.

4 The complaint in this case originally alleged that before August 28 the practice at the Poughkeepsie plant was that individual employees decided voluntarily whether or not to work overtime; however, it appears that this allegation has been dropped, since the factual stipulation entered into by the parties at the hearing refers consistently to Western's overtime policy as "compulsory assigned paid overtime" and as "mandatory overtime" and since no evidence was presented to indicate that acceptance of overtime assignments was ever voluntary.

employees who were members of Respondent performed mandatory paid overtime work as assigned.

On October 25, Respondent began taking steps to discipline these 17 members through internal union charges, fines, and lawsuits in state court, because they had violated the overtime ban.[5] On October 25, Respondent also filed an unfair labor practice charge against Western alleging that since April 1978 Western had failed to bargain in good faith with Respondent by dealing directly with its employees, by attempting to bypass Respondent as the bargaining representative of its employees, and by entering negotiations with a fixed position which it would not change during the course of bargaining.

By a letter dated December 7, Western notified Respondent that, because negotiations had reached an impasse, effective December 11 Western would implement its final contract offer, but that "Due to your continued threat of fines and discipline against employees who work in excess of 36-1/4 hours, the Company is not implementing the change to 37-1/2 hours per week at this time." On December 18, Respondent filed another unfair labor practice charge against Western alleging that Western had refused to meet and bargain with Respondent since early October 1978 and had unilaterally implemented its last offer on December 11 without a valid impasse in bargaining.[6]

On January 3, 1979, Respondent issued a notice to its members stating:

---

5 The documents included in the parties' stipulation indicate that the members involved were assessed a penalty of 1 day's pay plus a $50 fine for each day of overtime worked, plus attorneys' fees for the state court action to collect the fines.

6 The record reveals that a complaint was issued against Western on all of the above 8(a)(5) allegations and that the complaint against Western was consolidated for hearing with the complaint in this case. However, on September 26, 1979, the complaint against Western was severed from this case based upon a settlement agreement between Western and the General Counsel. The settlement agreement was approved unilaterally by the Regional Director for Region 3 despite Respondent's failure to enter into the settlement as the Charging Party.

As of January 3, 1979, the work rules and overtime ban implemented Agusut 28, 1978, will be lifted.

However, should the Company make any change in the 36-1/4 hours work week these rules will be re-implemented immediately.

The Negotiating Committee
/s/ Tony Sosta.

By a letter dated January 5, 1979, Western notified its employees and Respondent that the Union's notice of January 3, 1979, reflected no real change in the Union's position, that Western still intended to implement the 37-1/2-hour workweek as soon as the Union ended its threats of fines and discipline, and that the net result was that the Union's overtime ban remained in effect. After some discussion of this issue at a negotiation meeting on January 16, 1979, Western stated that it intended to implement the 37-1/2-hour workweek on January 22, 1979, and Respondent replied that the overtime ban was back on.[7] The record does not indicate whether Western ever actually implemented the 37-1/2-hour workweek or whether Respondent ever actually rescinded its January 3, 1979, notice and informed its members that the overtime ban was back in effect.

The Administrative Law Judge credited the uncontradicted testimony of Phyllis Goodall, a unit employee and Respondent's recording secretary, who was the only witness at the hearing in this case. Goodall testified that about 320 of Respondent's 490 members attended a special union meeting held on August 28 to discuss the proposed overtime ban.[8] She testified that during this meeting the members spoke about the same problems they had been complaining about at work and

---

7 The stipulated documents include the minutes of this meeting and of a negotiation meeting on February 16, 1979. The minutes indicate that many other issues were also discussed at these meetings, such as job classification, wage rates, union security, holidays, and several specific fringe benefits.

8 The parties stipulated that there were about 500 employees in the unit.

at previous meetings during July and August, when they had also discussed whether or not they should work overtime. She stated that the members were upset about the way negotiations were being dragged out and about the letters that Western was sending to employees concerning the negotiations.[9] She also stated that employees asked "why we were working the company's overtime when they . . . were doing different things to the members."[10] She testified that there was some mention of imposing fines on anyone who broke the proposed overtime ban, but that there was no discussion of the amount of the fines until a later meeting. At this meeting, the members voted 220 for and 100 against imposing an overtime ban, effective immediately.

Analysis

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In determining the legality of particular union rules under the proviso to this section, the Supreme Court has historically held that the internal enforcement of a properly adopted union rule against voluntary union members by expulsion or a reasonable fine is permissible, where the rule reflects a legitimate union interest and frustrates no statutory labor policy.[11] In this case, the union rule was properly adopted by a majority vote of the members, there is no showing that membership in the Union

---

9 Respondent's first unfair labor practice charge against Western specifically alleged that Western "has mounted a massive communications campaign directly with its employees designed to circumvent the collective-bargaining representative of its employees. . . ."

10 Goodall did not explain what "different things" Western was doing to employees.

11 *Scofield et al.* v. *N.L.R.B.*, 394 U.S. 423, 428-430 (1969).

was involuntary, and the rule was enforced solely through the internal method of union charges and fines collected by threat of judicial action. Therefore, the questions to be answered are whether the rule was invoked to promote a legitimate union interest and whether the rule invades any overriding policy of the labor laws.

It might be argued that the rule involved here was adopted in furtherance of the Union's legitimate interest in functioning as an effective bargaining agent, regardless of whether it was imposed merely as a bargaining tactic designed to put economic pressure on Western during collective bargaining as contended by the General Counsel or whether it was imposed in response to Western's alleged unfair labor practices as contended by Respondent. However, the Supreme Court has indicated that any union rule which frustrates a statutory labor policy goes beyond the legitimate interests of a labor organization.[12] The crucial inquiry is thus whether the Union's overtime ban violated any policy of the Act.

It is well established that a union violates Section 8(b)(1)(A) of the Act if it disciplines members who refuse to engage in unprotected activity which would subject them to lawful discipline by their employer.[13] It is also clear that the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike.[14] There is no dispute in this case that Respondent, by its promulgation of new "Work Rules" on August 28, announced the intention of its members to engage in such unprotected repeated refusals to work man-

---

12 *Id.* at 430; *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America [United States Lines Co.]*, 391 U.S. 418, 424 (1968).

13 *Insurance Workers International Union AFL-CIO, Local 60 (John Hancock Mutual Life Insurance Company)*, 236 NLRB 440 (1978).

14 *John S. Swift Company, Inc.*, 124 NLRB 394 (1959), enfd. 277 F.2d 641 (7th Cir. 1960); *Honolulu Rapid Transit Company, Limited*, 110 NLRB 1806 (1954). See also *First National Bank of Omaha*, 171 NLRB 1145, 1149-51 (1968), enfd. 413 F.2d 921 (8th Cir. 1969); *J. P. Hamer Lumber Company, Division of Gamble Brothers, Inc.*, 241 NLRB No. 100 (1979).

datory overtime if assigned to do so. However, the Administrative Law Judge concluded that the employees' planned refusal to work overtime was protected because it was in response to the unfair labor practices Western had allegedly committed during collective bargaining. We disagree.[15]

We find that the employees voted to impose the overtime ban solely as a bargaining tactic, designed to put economic pressure on Western and to force Western to make bargaining concessions, rather than in response to any perceived unfair labor practices.[16] Accordingly, we regard the cases cited in footnote 14 as controlling and find it unnecessary to pass on the question of whether a different result would obtain had the employees been protesting unfair labor practices committed by their employer. In coming to this conclusion as to the emloyees' motivation, we note that no charges were filed against Western until almost 2 months after the overtime ban was implemented, that there is no evidence of any discussion at the August 28 union meeting characterizing Western's actions as unfair labor practices, that Respondent's notice announcing the overtime ban makes no reference to Western's alleged unfair labor practices, and that the meager evidence as to the

---

15 While it is unnecessary to our decision in this case, we note that even under the Administrative Law Judge's own rationale it must be shown that the Employer actually committed unfair labor practices which the employees were protesting. However, there has been no finding either in this case or in any prior Board cases that Western has committed any unfair labor practices. Rather, the Administrative Law Judge relied upon the mere fact that Respondent had filed charges alleging that Western has committed unfair labor practices, which Western later agreed to settle over Respondent's objections. The Administrative Law Judge then precluded Respondent from litigating the merits of its unfair labor practice charges against Western as part of its affirmative defense. This was clearly incorrect.

16 In reaching this conclusion, we particularly rely on the fact that the overtime here in question was mandatory and lawfully imposed. Cf. *Excavation-Construction, Inc.*, 248 NLRB No. 81 (1980); *Gaska Tape, Inc.*, 241 NLRB No. 96 (1979), and Member Jenkins' dissent in *Prince Lithograph Co., Inc.*; 205 NLRB 110 (1973). We do not rely on *Valley City Furniture*, 110 NLRB 1589 (1954), 230 F.2d 947 (6th Cir. 1956), which we consider incorrectly decided. See *Excavation-Construction, supra*, sl. op. at p. 19.

discussion at the August 28 union meeting indicates the employees were mainly concerned with Western's failure to reach an agreement with the Union quickly.

Therefore, we conclude that, notwithstanding the alleged unfair labor practices of Western, Respondent's overtime ban constituted an unprotected partial strike and Respondent violated Section 8(b)(1)(A) by disciplining its members who refused to engage in such unprotected activity.

Conclusions of Law

1. Western Publishing Co., Inc., is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent GAIU Local 13-B, Graphic Arts International Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By enforcing an overtime ban prohibiting its members from performing mandatory assigned overtime work through the imposition of internal union discipline upon Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for their refusals to engage in an unprotected recurring and intermittent partial strike, Respondent has violated Section 8(b)(1)(A) of the Act.

4. Respondent's violations of Section 8(b)(1)(A) of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the

Act. Specifically, as we have found that Respondent has unlawfully disciplined and fined its members Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne La Forge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, we shall order that Respondent rescind the disciplinary action taken against them and that it make them whole for any losses they have suffered as a result of Respondent's unlawful conduct. In particular, we shall order Respondent to refund to them any moneys held or collected on account of the fines assessed against them, with interest thereon to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, GAIU Local 13-B, Graphic Arts International Union, Hyde Park, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Charging, trying, fining, prosecuting any lawsuits to collect fines, or otherwise disciplining Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnne Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, or any of its members, for refusing to engage in an unprotected recurring and intermittent partial strike.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

---

17 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the disciplinary action taken against Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hale, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for refusing to engage in an unprotected recurring and intermittent partial strike, and expunge from their records any reference to that discipline.

(b) Make Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hale, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer whole for any losses they have suffered as a result of the unlawful conduct, in the manner set forth in "The Remedy" section of this Decision.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director for Region 3 sufficient copies of the attached notice marked "Appendix" for posting by Western Publishing Co., Inc., if willing, in

---

18 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

conspicuous places, including all places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1980

/S/ JOHN H. FANNING
John H. Fanning, Chairman

/S/ HOWARD JENKINS, JR.
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER PENELLO, concurring:

I agree with my colleagues that Respondent violated Section 8(b)(1)(A) by disciplining its members who refused to engage in an unprotected partial strike; however, in reaching this result, I find it unnecessary to disturb the Administrative Law Judge's conclusion that the employees were protesting Western's allegedly illegal conduct. For, even assuming that the overtime ban was instituted in response to actual unfair labor practices committed by Western, I would conclude that such conduct by Western would not privilege the employees to engage in what would otherwise be a clearly unprotected partial strike.

In this regard, I rely on *Valley City Furniture Company*.[19] There, the respondent employer refused to provide the union with wage information, unilaterally increased employee working hours from 8 to 9 hours per day, and gave its negotiators only limited authority. The union held a meeting at which the employees decided:

19 110 NLRB 1589 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

> to cut out overtime *until and unless* the Company would meet with [the Union] and bargain in good faith . . . [and] . . . to cut out overtime beginning on the following day; that is . . . to cease work at 3:30 instead of 4:30 [p.m.], the 3:30 period being the end of the eight hour day.

The next day, the respondent was informed of the union's decision, and at 3:30 p.m. a number of employees walked off the job.

Although the Board held that the respondent violated Section 8(a)(5) by the acts described above, it found that inasmuch as the employees had refused to work the overtime hours set by the respondent and had intended to continue such tactics, their conduct constituted an unprotected partial strike. The Board further held that the unprotected nature of this activity was not changed by the fact that the respondent had committed unfair labor practices, stating:[20]

> We find that the partial strike called by the Union from its very inception was the sort of activity which, although concerted, is not, as against the action taken by the Respondent, entitled to the protection of the Act. The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act. It is true, as our dissenting colleagues state, that the Respondent unilaterally changed the hours of work. But that unlawful act did not privilege the Union's resort to the partial strike as a self-help device, any more than the Union would have

---

20 *Id.* at 1594-95.

been privileged to engage in a sitdown strike or slowdown to protest the Respondent's action.[14]

---

14 We find no merit in the General Counsel's argument that a partial strike, otherwise unprotected, would gain the protection of the Act by reason of its having stemmed from the Respondent's unfair labor practices. We regard the case cited by the General Counsel (*Mastro Plastics Corp.*, 103 NLRB 511) as inapposite.

In the instant case, the Administrative Law Judge found that Respondent instituted a ban on overtime as a reaction to and in protest of Western's allegedly unlawful refusal to bargain in good faith and its allegedly unlawful written communications to employees. However, even assuming that such conduct was in fact violative of Section 8(a)(5), I conclude that under the teachings of *Valley City* those "unlawful act[s] did not privilege the Union's resort to the partial strike."[21]

I recognize that the Board has found that where an employer has, in violation of Section 8(a)(5), unilaterally instituted changes in the hours of work, employee refusals to comply therewith are protected and do not constitute a partial strike.[22] But in those cases the employees' conduct consisted of nothing more than noncompliance with an unlawfully instituted rule and there was no indication that the employees intended to engage in a partial work stoppage to compel their employer to take some action. In contrast, in *Valley City*, as indicated above, the employees were not solely protesting the respondent's unilateral increase in working hours, but were also protesting its refusal to meet with the union and bargain in good faith. Significantly, the refusal to work overtime was the method chosen by the employees to compel the respondent to change its bargaining tactics. Thus, unlike the situation in the cases described above, the employees in *Valley City* were not merely refusing to comply with an unlawfully instituted rule.

---

21 *Id.* at 1595.

22 *Gaska Tape, Inc.*, 241 NLRB No. 96 (1979); *Anderson Plumbing and Heating Company*, 203 NLRB 18 (1973).

Similarly, in the instant case, even accepting the Administrative Law Judge's characterization of the employees' motivation, i.e., that they were reacting to alleged unfair labor practices committed by Western, it is clear to me that they, like the employees in *Valley City*, were attempting to compel their employer to change its bargaining tactics. In my view, it is obvious that this is not a case where employees were merely refusing to comply with unilaterally instituted changes made by their employer with regard to working hours, because no such changes had in fact occurred at the time the overtime ban was instituted.

Finally, I disagree with the Administrative Law Judge's reliance on the cases cited in support of his conclusion that the employees' partial strike was protected.[23] I specifically take exception to the Administrative Law Judge's statement that

---

23 I did not participate in *Blades Manufacturing Corporation*, 144 NLRB 561, 564-567 (1973), enforcement denied 433 F.2d 998 (8th Cir. 1965), or in *Schneider Mills, Inc.*, 164 NLRB 879, 884, fn. 17 (1967), and I regard those cases as of doubtful precedential value inasmuch as they did not discuss the application of *Valley City, supra*. Furthermore, I find *Blades* to be distinguishable since the concerted activities there were treated as a series of single concerted refusals to work, each in protest of a separate unlawful act by the employer, rather than as recurring and intermittent partial strikes. In *Schneider Mills*, the Administrative Law Judge found certain partial strike activity to be protected as a response to employer unfair labor practices, but the Board added its own rationale for finding the violations in issue and did not adopt the Administrative Law Judge's reasoning on that point. To the extent that *Blades* and *Schneider Mills* can be read as being inconsistent with *Valley City*, I would not follow them.

The Administrative Law Judge also cited *N.L.R.B.* v. *Thayer Company*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, *ipso facto*, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act. However, I conclude that while it may effectuate the purposes of the Act to require the employer to correct its own unfair labor practice by reinstating employees who were discharged for engaging in some less egregious form of unprotected activity, this balancing of interests does not mean that the union can then lawfully discipline its members for refusing to engage in such unprotected activity.

Mastro Plastics Corp. v. *N.L.R.B.*, 350 U.S. 270 (1956), stands for the general proposition that "when employees engage in a strike action in response to employer unfair labor practices, they are treated differently from employees who act solely by furtherance of economic demands." In *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961),[24] the Board eschewed a broad interpretation of *Mastro Plastics*. The Board reasoned that the language used by the Court and its rationale could not be divorced from the facts of the case and the argument presented by the parties. The Board held in *Arlan's* that employees are privileged to engage in a strike in violation of a no-strike clause in their collective-bargaining agreement, which would otherwise by unprotected, only where they are protesting "flagrant" or "serious" unfair labor practices by their employer. The Board indicated that where the employer is engaging in conduct attacking the very existence of the collective-bargaining representative it is materially breaching its obligations under the contract and therefore the union should be excused from performance of the no-strike clause. In the absence of such a clause, a total strike is, of course, a protected concerted activity. However, the same cannot be said of the conduct in issue here, for repeated refusals to work mandatory overtime constitute unprotected activity even in the absence of a no-strike provision. Therefore, this is not a situation where the unfair labor practices of an employer can be viewed as eliminating the only circumstance which renders the employees' activity unprotected. Accordingly, in my view, the *Mastro Plastics* line of case law does not support the result reached by the Administrative Law Judge.

Dated, Washington, D.C. September 30, 1980

/S/ JOHN A. PENELLO
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

---

24 *Arlan's* was recently reaffirmed by the Board in *The Dow Chemical Company*, 244 NLRB No. 129 (1979).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT charge, try, fine, prosecute any lawsuits to collect fines, or otherwise discipline Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer, or any of our members, for refusing to engage in an unprotected recurring and intermittent partial strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the disciplinary action taken against Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer for refusing to engage in an unprotected recurring and intermittent partial strike, and WE WILL expunge from their records any reference to that discipline.

WE WILL make Robert Greene, Helen Tabone, Barbara Jones, Helen Lenehan, John Hildebrand, Patricia Porter, Geraldine Aiello, Ardine Hall, Bernard Lewis, Patricia Long, Richard Bennet, Marianne LaForge, JoAnn Balastire, William Rowe, Pearl Ryan, Samuel Cherry, and Bruce Bauer whole for any losses they have suffered as a result of our unlawful conduct. In particular, WE WILL refund to them any moneys held or collected on account of the fines assessed against them in connection with the aforesaid disciplinary action, with interest.

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION

_____
(Labor Organization)

Dated _____ By _____
(Title) (Representative)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10007, Telephone 716-846-4951.

APPENDIX D

29 U.S.C. § 141

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) * * *

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 142

When used in this chapter—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 U.S.C. § 151

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the

practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 401

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

* * *

(c) The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employ-

ment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

29 U.S.C. 411

(a)(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 529

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

Supreme Court, U.S.
FILED
JAN 7 1983
ALEXANDER L. STEVAS
CLERK

No. 82-418

In the Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
JOHN H. FERGUSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by disciplining employee members who refrain from engaging in unprotected concerted activity for which they may be lawfully discharged or otherwise disciplined by their employer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

C.G. Conn, Ltd. v. *NLRB*, 108 F.2d 390	7
Dow Chemical Co., 152 N.L.R.B. 1150	8
Home Beneficial Life Insurance Co. v. *NLRB*, 159 F.2d 280, cert. denied, 332 U.S. 758	7
John Swift Co., 124 N.L.R.B. 394, aff'd, 277 F.2d 641	7
Lodge 76, The International Association of Machinists & Aerospace Workers v. *Wisconsin Employment Relations Commission*, 427 U.S. 132	8, 11
NLRB v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175	9
NLRB v. *Blades Manufacturing Corp.*, 344 F.2d 998	7
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221	8
NLRB v. *Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418	9
NLRB v. *Insurance Agents' International Union*, 361 U.S. 477	11
NLRB v. *Montgomery Ward & Co.*, 157 F.2d 486	7

Cases—Continued: Page

Polytech, Inc., 195 N.L.R.B. 695 7
Prince Lithograph Co., 205 N.L.R.B. 110 . 8
Printz Leather Co., 94 N.L.R.B. 1312 10
Radio Officers' Union v. *NLRB*, 347 U.S. 17 ..... 9, 10
Scofield v. *NLRB*, 394 U.S. 423 ..... 9, 10
Valley City Furniture Co., 110 N.L.R.B. 1589, enforced, 230 F.2d 947 5
Woelke & Romero Framing, Inc. v. *NLRB*, No. 80-1798 (May 24, 1982) 7

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2
Section 7, 29 U.S.C. 157 ..... 4, 6, 7, 8, 11
Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 4, 8, 9
Section 8(b)(3), 29 U.S.C. 158(b)(3) ... 11
Section 10(e), 29 U.S.C. 160(e) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-418

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 682 F.2d 304. The decision and order of the National Labor Relations Board (Pet. App. 21a-38a) are reported at 252 N.L.R.B. 936.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on June 11, 1982. The petition for a writ of certiorari was filed on September 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 39a-41a.

STATEMENT

1. Since 1952, petitioner has represented some 500 production and service employees at Western Publishing Co.'s Poughkeepsie, New York, plant, one of several printing facilities operated by Western in the United States. In April 1978, petitioner and Western commenced negotiations for a new contract to replace the collective bargaining agreement that was due to expire on May 16, 1978. Negotiations continued until September 1979, without reaching an agreement (Pet. App. 22a).

Throughout the period of the contract negotiations, the employees were obligated under the terms of their employment to perform overtime work assigned by their employer (Pet. App. 23a n.4). On July 14, 1978, Western issued formal reprimands to various employees who refused direct orders to work overtime (Pet. App. 23a) and warned them "that any future unexcused refusal on your part to work assigned overtime will subject you to disciplinary action, up to and including suspension or discharge" (C.A. App. 46-56, 108, 110, 111).[1] Certain other employees, who had previously refused to work mandatory overtime, were issued one-day suspensions (Pet. App. 23a). Western advised these employees that the date of the suspension "will be designated by the Company to minimize interference with production" (C.A. App. 44, 45); the suspensions have been held in abeyance pending resolution of this case (Pet. App. 23a n.3).

---

[1] "C.A. App." denotes the appendix filed in the court of appeals.

The employees became upset about the slow pace of the contract negotiations, and on August 28, 1978, in an effort to pressure Western to make economic concessions, the Union adopted a rule preventing its members from performing mandatory overtime work (Pet. App. 23a, 25a-26a, 28a-29a). The rule was adopted at a special union meeting attended by 320 of the 500-odd unit members. Of those present, 220 voted for and 100 against imposing the overtime ban (*id.* at 25a-26a). The Union's "Work Rules" announcing the ban, subsequently posted throughout the plant, stated (Pet. App. 23a):

1. No overtime shall be worked by any member of Local 13-B Poughkeepsie G.A.I.U.
2. Established shift and starting times in effect August 28, 1978 shall not be changed.
3. Failure to comply with these rules and any disciplinary action and/or discharge of any member of Local 13-B for the observance of these work rules shall be considered an action taken against all of the members and will be treated by the Local as a lock out.

On August 30, 1978, the Company notified its employees that all overtime would be immediately discontinued "since it was reported to us that employees were being threatened with fines should they work any overtime" (Pet. App. 23a). Because of the needs of one of its largest customers, however, the Company, on October 17, 1978, notified its employees that mandatory overtime would be reinstituted the following weekend. The Company stated that, although it had a legal right to discipline employees who refused to work overtime, it did not intend to do so, but that it intended to accomplish the work with nonunit employees if necessary (Pet. App. 23a). On October 21, 1978, the Company reinstated its mandatory overtime policy (*ibid.*).

On or after October 21, 1978, at least 17 unit employees who were union members performed compulsory

overtime work in contravention of the Union's rule banning such work (Pet. App. 23a-24a). On October 25, the Union began disciplining these employees with union penalties of one day's pay plus a $50 fine for each day of overtime worked (*id.* at 24a & n.5).[2] In addition, the Union sued at least two employees in state court to collect unpaid overtime fines, as well as attorneys' fees for bringing the suits (Pet. App. 24a & n.5).

2. Upon charges filed by one of the employees who had been disciplined by the Union, the Board found that petitioner's enforcement of its overtime ban violated Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), because it required employee members to engage in an unprotected "partial strike" for which they could lawfully be discharged or disciplined by their employer (Pet. App. 26a-29a). The Board rejected petitioner's defense— which had been accepted by the Administrative Law Judge (Pet. App. 28a)—that the ban was enacted in protest of unfair labor practices allegedly committed by Western and, for this reason, did not fall within the rule that the repeated refusal of employees to perform mandatory overtime is a partial strike unprotected by Section 7 of the Act, 29 U.S.C. 157. Rather, on the facts presented, the Board found that, notwithstanding

---

[2] On October 25, 1978, the Union also filed an unfair labor practice charge alleging that the Company had failed to bargain in a good faith effort to reach agreement and had improperly attempted to bypass the Union by communicating directly with employees (Pet. App. 24a). On December 18, 1978, the Union filed a second unfair labor practice charge alleging that the Company had engaged in bad faith bargaining and had unlawfully implemented unilateral changes in work conditions without a valid impasse in bargaining (*ibid.*). The Board's Regional Director subsequently issued a complaint on the Union's charges. In September 1979, however, the Regional Director approved a formal settlement agreement between the Company and the General Counsel. The Union did not enter into or approve this settlement (Pet. App. 24a n.6).

Western's alleged unfair labor practices during the bargaining (see page 4 n.2, *supra*), "the employees voted to impose the overtime ban solely as a bargaining tactic, designed to put economic pressure on Western and to force Western to make bargaining concessions * * *" (Pet. App. 28a). Accordingly, the Board found it "unnecessary to pass on the question of whether a different result would obtain had the employees been protesting unfair labor practices committed by their employer" (*ibid.*).[3]

The Board's order requires the Union to cease and desist from the unfair labor practice found and from violating the Act in any like or related manner. Affirmatively, the Board's order directs the Union to rescind all disciplinary action against the 17 members who resisted its overtime ban; to compensate them for any losses suffered as a result of its unlawful conduct, including the refund of any fines assessed against them, plus interest; to post the customary notice reflecting the Board's order at its offices and meeting halls; and to send a signed copy of the notice to the Company for posting, if the Company is willing to do so (Pet. App. 29a-32a).

---

[3] In finding petitioner's defense factually unsupported, the panel majority noted that "we particularly rely on the fact that the overtime here in question was mandatory and lawfully imposed" (Pet. App. 28a n.16). Characterizing it as "incorrectly decided," the majority disclaimed reliance on *Valley City Furniture Co.*, 110 N.L.R.B. 1589 (1954), enforced, 230 F.2d 947 (6th Cir. 1956), which held recurrent refusals to work overtime to be unprotected activity even though done in direct response to the employer's unlawful change in work hours.

Board Member Pennello, in a concurring opinion (Pet. App. 32a-36a), found it unnecessary to distinguish *Valley City Furniture* from the present case, because in his view even unlawful acts by the employer do not entitle a union to resort to a partial strike, except where, unlike here, the employees' conduct consists of "nothing more than noncompliance with an unlawfully instituted rule" (*id.* at 34a).

2. On review, the court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-18a). The court found that substantial evidence supported the Board's finding that petitioner's "overtime ban was not adopted in response to the Employer's alleged unfair labor practices but solely as an economic weapon to improve the Union's bargaining position in ongoing negotiations" (Pet. App. 12a).[4] In agreement with the Board, the court held that, because the employee members who honored petitioner's overtime ban could lawfully be discharged by their employer, petitioner's forcing their participation in the ban impermissibly restrained their right to engage in or refrain from union activity without jeopardizing their jobs (Pet. App. 6a-11a).

ARGUMENT

1. The first issue presented by the petition—whether Section 7 of the National Labor Relations Act, 29 U.S.C. 157, protects employees who, in order to pressure their employer to grant economic concessions, work only their regular hours and refuse to carry out their normal duty to perform overtime work—is not properly raised here. In the proceedings before the Board, petitioner did not question the rule—long applied by the Board and the courts of appeals—that the right to engage in concerted activity protected by Section 7 of the Act does not preclude employers from

---

[4] The court of appeals rejected petitioner's contention that, because of erroneous evidentiary rulings by the Administrative Law Judge, petitioner was denied a fair opportunity to make out its defense that its overtime ban was a protest of unfair labor practices by the employer. The court ruled that petitioner had not raised this objection before the Board and was therefore barred from raising it on judicial review and that, in any event, consideration of the excluded evidence would not cause "appreciable likelihood of any change in the result" (Pet. App. 13a-18a).

discharging or otherwise disciplining employees who, in order to extract economic benefits, engage in "partial strikes," including refusing to perform overtime work assigned to them by their employer.[5] Instead, petitioner sought to avoid this rule on the ground that its overtime ban was a protest of the employer's alleged unfair labor practices and for this reason only was protected by Section 7 (C.A. App. 167-173). The Board rejected this contention on factual grounds, and the reasonableness of its fact findings was sustained by the court of appeals (Pet. App. 12a-13a, 28a).

In these circumstances, Section 10(e) of the Act, 29 U.S.C. 160(e), prevents judicial consideration of petitioner's belated contention that the overtime ban should be held to be protected activity even if not in protest of unfair labor practices. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. Even assuming arguendo "that case-by-case adjudication by the federal Board will ultimately result in

---

[5] See *C.G. Conn, Ltd.* v. *NLRB*, 108 F.2d 390, 397 (7th Cir. 1939); *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946); *Home Beneficial Life Insurance Co.* v. *NLRB*, 159 F.2d 280 (4th Cir.), cert. denied, 332 U.S. 758 (1947); *NLRB* v. *Blades Manufacturing Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965); *John Swift Co.*, 124 N.L.R.B. 394, 396-397 & n.4 (1959), aff'd 277 F.2d 641, 646 (7th Cir. 1960). See also *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

As stated by the Seventh Circuit in *C.G. Conn, Ltd.* v. *NLRB*, *supra*, 108 F.2d at 397, such activity is unprotected because "[w]e are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case * * * are 'protected' activities within the meaning of § 7, * * *" *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 n.14 (1976), the predicate for such a development is a timely raising of the issue before the agency with the primary responsibility of "applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). That predicate is absent in this case.[6]

2. The second issue raised by the petition—whether a union violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by disciplining employee members who refrain from engaging in unprotected concerted activity for which they may lawfully be discharged by their employer—was correctly decided below. The decision of the court of appeals is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

a. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce" employee-members in the exercise of their rights under

---

[6] In *Lodge 76, The International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. at 152-153 n.14, the Court noted evolving Board case law limiting the partial strike rule to situations where overtime was mandatory and finding that refusals to work voluntary overtime were protected. See *Dow Chemical Co.*, 152 N.L.R.B. 1150, 1151-1152 (1965); *Prince Lithograph Co.*, 205 N.L.R.B. 110, 115 (1973). In the present case, as the Board noted, allegations that the overtime here was voluntary were dropped and the parties stipulated that overtime was mandatory (Pet. App. 23a n.4). Before the court of appeals, petitioner conceded (Reply Br. 6) that the Board's reliance on the mandatory nature of the overtime here (Pet. App. 28a n.16) was proper.

Section 7, 29 U.S.C. 157, which include the right to engage in or refrain from concerted activities. But, a proviso to Section 8(b)(1)(A) preserves to the union the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." Based on the legislative history of the section, including the proviso, this Court has determined that Section 8(b)(1)(A) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969). Although unions thus have considerable freedom to require their members to abide by union rules, "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *NLRB*, *supra*, 394 U.S. at 429. Accord, *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418, 424 (1968).

b. The "policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954), and the relevant statutory provisions are "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood" (*ibid.*). Consistent with this policy, the proviso permitting unions to regulate their own internal affairs was not intended to permit " 'enforcement of a union's internal regulations to affect a member's employment status.' " *Scofield* v. *NLRB*, *supra*, 394 U.S. at 428, quoting *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195 (1967). Accordingly, just as a union is normally precluded from directly causing an employer to discharge an employee member for refusing to ad-

here to union rules, see *Radio Officers' Union* v. *NLRB*, *supra*, 347 U.S. at 40-42; *Printz Leather Co.*, 94 N.L.R.B. 1312, 1313, 1323-1329 (1951), so here it is contrary to statutory policy to permit petitioner to enforce a rule requiring employee members to engage in conduct that is cause for discharge. As the court of appeals explained (Pet. App. 9a-10a; citations omitted):

> A union rule requiring an employee to engage in such unprotected activity, even though adopted by a majority of the union's members, amounts to an unlawful restraint or coercion on its employee-members. It forces them, it[sic] they wish to continue working, to engage in unlawful activity and to risk being lawfully discharged by their employer or subjected to lawful imposition of disciplinary measures. An employee who engages in lawful strike activity retains his accrued rights, § 2(3) of the Act, 29 U.S.C. § 152(3), and is entitled to reinstatement upon conclusion of the strike unless the employer shows legitimate reasons to the contrary * * *. However, an employee discharged for misconduct in violation of the terms of his employment may be denied reinstatement * * *. For these reasons, this type of economic coercion on the part of a union, forcing members to engage in unprotected activity, is impermissible since it jeopardizes the members' employment relationships, imperils their livelihood, and impairs our national labor policy. * * * Nor may such a union rule be saved on the ground that the employee who wishes to avoid unprotected activity may leave the union and escape the rule. A rule which is inconsistent with our national labor policy must give way.[7]

---

[7] The union rule sustained in *Scofield*, unlike the rule here, did not require employee members to engage in conduct for which they could be discharged for cause. *Scofield* emphasized that the employer had never disciplined employees who abided by the union's longstanding rule setting a ceiling on production and indeed that the employer had not only signed contracts

c. The result reached by the Board and the court of appeals is consistent with *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), and *Lodge 76, The International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. 132. Neither of those cases considered the issue of *employee* rights presented here—namely, whether a union may discipline employee members who refrain from engaging in an unprotected partial strike. In *Insurance Agents'*, The Court merely held that unprotected union activity used as a form of economic pressure (e.g., work stoppages, " 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics") for which "the employer could have discharged or taken other appropriate disciplinary action against the employees" (361 U.S. at 493-494), did not constitute a refusal to bargain in good faith in violation of Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3). In *Lodge 76*, the Court simply held that the Act preempts state regulation of the use of an overtime ban as an economic weapon. Indeed, the Court specifically noted that it was not ruling on the question whether the overtime ban there was "protected" under Section 7 of the Act, and added that the employer would in any event have countervailing economic weapons available, including "discharg[ing] or tak[ing] other appropriate disciplinary action against the employees participating" in the refusal to work overtime (427 U.S. at 152-153 & n.14).

---

recognizing the rule but also had cooperated in its administration (394 U.S. at 432-433). In these circumstances, as *Scofield* recognized, "the price of obeying the rule" was not even as high as that in an ordinary strike, during which employees can be replaced for refusing to work (*id.* at 435). Here, by contrast, the employer has never abandoned its right to discipline employees for refusing mandatory overtime work; thus, the "price of obeying the rule" could well be complete job loss without any reinstatement rights.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN H. FERGUSON
Attorney
National Labor Relations Board

JANUARY 1983

Supreme Court, U.S.
FILED
JAN 26 1983
Alexander L. Stevas, Clerk

No. 82-418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,
Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

REPLY BRIEF

RALPH P. KATZ
DELSON & GORDON
230 Park Avenue
New York, New York 10169
(222) 661-9800
Counsel for Petitioner

TABLE OF CONTENTS

	PAGE
REPLY WITH RESPECT TO THE FIRST ISSUE PRESENTED	1
REPLY WITH RESPECT TO THE SECOND ISSUE PRESENTED	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	PAGE
American Federation of Musicians of the United States and Canada v. Carroll, 391 U.S. 99 (1968)	5
American Newspaper Publishers Assoc. v. NLRB, 344 U.S. 812 (1952)	4
American Newspaper Publishers Assoc. v. NLRB, 193 F.2d 782 (7th Cir. 1951)	4
Carroll v. American Federation of Musicians of the United States and Canada, 372 F.2d 155 (2nd Cir. 1967)	5
Carroll v. American Federation of Musicians of the United States and Canada, 241 F.Supp. 865 (U.S.D.C., S.D.N.Y., 1965)	5
Glasser v. NLRB, 395 F.2d 401 (2nd Cir. 1968)	5
IAM, Local Lodge No. 504 (Arrow Development Co.), 185 NLRB 365 (1970)	6
Local 248, UAW (Allis-Chalmers Mfg. Co.), 149 NLRB 67 (1964)	6
Local 283, UAW (Wisconsin Motor Corp.), 145 NLRB 1097 (1964)	6
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	3, 4, 5
NLRB v. International Longshoremen's and Warehousemen's Union, Local 13, 581 F.2d 1321 (9th Cir. 1981)	4
Printz Leather Co., 92 NLRB 1312 (1951)	4
Scofield v. NLRB, 394 U.S. 423 (1969)	4, 5

PAGE

Statutes:

National Labor Relations Act, as amended

Section 7, 29 U.S.C. § 157 6

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-418

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

REPLY BRIEF

REPLY WITH RESPECT TO THE FIRST ISSUE PRESENTED

The National Labor Relations Board (NLRB) seeks to avoid a determination of the first of the two issues presented in this case by asserting that the issue is not properly before the Supreme Court because it was never raised before the NLRB. This argument is now presented for the first time. The opinion of the Court of Appeals in this case (App. A to petition) shows that it was not raised there. The NLRB itself understood that the issue was before it, and ruled on the very proposition which the government now asserts was not raised. The NLRB held

that "the repeated refusal of employees to perform mandatory assigned overtime work is unprotected by the Act because it constitutes a recurring or intermittent partial strike." (App. B to petition, p. 27a footnote 14 omitted; see also App. B, p. 29a, paragraph numbered 3; and App. B, p. 30a, paragraph numbered 1(a)) Indeed the first issue raised in the petition, a questioning of the determination that strikers are unprotected when they engage in a partial strike under circumstances where they would have been protected had they engaged in a full strike, is the cornerstone of the NLRB's decision, its conclusion of law, and its order.

Moreover, the transcript of the record before the NLRB includes an opening statement by counsel for GAIU Local 13-B, Graphic Arts International Union (Union) which, although not a model of clarity, directly presents the first issue made to this Court on this petition, namely: that partial strikers should be given the same protection that full strikers would be given in the same circumstances. Thus, the opening statement reads:

> "MR. DUBIN: Yes. We intend to show, simply because there was only a partial strike, let us call it that, makes no difference. The activity, if it were concerted protected activity, there'd be no unfair labor practice charge against this union. If this employer committed an unfair labor practice or several, and the union went out on an unfair labor practice strike, there would be no charge against the union. But, because the union shows [chose] as its self-help remedy not to engage in a complete strike, but only to engage in something less than that, it's facing these charges.
>
> "Our intent will be to show that this distinction really doesn't make much sense in this proceeding. If the union really has no other choice, sure it can file a charge and it did file a charge, and the resolution of that charge is months off, as this case shows, what does the union do the first month when it's faced with unfair labor prac-

tices? What does it do the second month it's faced with unfair labor practices? It has to do something.

"It shows [chose] a lesser measure than a complete strike and is facing charges as a result of it, and we don't see the distinction. That's our case."

Therefore, on the record before the NLRB and on the basis of the decision of the NLRB, it is shown that this belated assertion, which was never raised before the Court of Appeals, is incorrect. The issue was before the NLRB and is properly before this Court.

Except for this incorrect assertion, the NLRB offers no reason why this Court should not finally rule on this issue. It is time for the matter to be decided, for both labor and management should have the definitive statement of the law which only this Court can provide.

REPLY WITH RESPECT TO THE SECOND ISSUE PRESENTED

Likewise with respect to the second issue raised: the state of the law is unsettled and guidance from this Court is necessary for passage through what are now conflicting guideposts. Some evidence of the unsettled state of the law is found from the fact that the Union and the NLRB are both citing the same decisions of this Court to support their respective positions. The Union relies on the results reached and the language as applied and as limited by the Court itself in its decisions. The NLRB relies on a broad interpretation of the language of the majority while repeating the arguments made in the dissents.

In cases where this Court did *not* find any union violation, the Court wrote: "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967); quoted in *Scofield v.*

NLRB, 394 U.S. 423, 428, (1969) But this language, so far as our research shows, has never been applied by this Court to hold that a union has violated the law by enforcing an internal rule because that rule affected an employee's employment status. The NLRB has not cited such a case. A careful reading of the language in *Allis-Chalmers,* especially as elaborated on in *Scofield* at 394 U.S. at 428, reveals that this Court, in writing of "barring *enforcement* of a union's internal regulations to affect a member's employment status" (emphasis added) had in mind the distinction between "internal from external *enforcement*", (emphasis added) and not the substance of the rule itself.

Thus, the case cited by the NLRB in its brief in opposition to the petition in this case, *Printz Leather Co.*, 92 NLRB 1312 (1951), is cited by this Court in *Scofield,* 394 U.S. at 429 ftnt. 5, not for the proposition that the union rule itself constituted a violation of the law; but for the proposition that the union's enforcement of the rule by compelling an employee's discharge from his employment constituted the violation. See *NLRB v. International Longshoremen's and Warehousemen's Union, Local 13,* 581 F. 2d 1321 (9th Cir. 1981).

In this case, the Union's sole efforts to enforce its rule were precisely those employed in *Allis-Chalmers,* a fine and an attempt to effect collection of the fine by bringing legal proceedings in a court of law. Thus, the NLRB and the court below in this case miscited *Allis-Chalmers* and *Scofield* and strayed from this Court's specific approval, in *Scofield* at 394 U.S. at 428 ftnt. 4, of the position "that § 8(b)(1)(A)'s legislative history requires a narrow construction. . .". There is, therefore, a clear distinction between the *Printz Leather Co.* case and the one now before this Court.

In *American Newspaper Publishers Assoc. v. NLRB,* 344 U.S. 812 (1952) granting certiorari as to one issue only, this Court declined to review that part of the decision at 193 F. 2d 782 (7th Cir. 1951) which held that it was not a violation of Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) for a union to

enact and enforce a rule affecting an employee's employment status. The rule in that case prohibited a member from accepting employment with an employer who employs non-union employees.

See *American Federation of Musicians of the United States and Canada v. Carroll,* 391 U.S. 99 (1968) where, on review of *Carroll v. American Federation of Musicians of the United States and Canada,* 372 F. 2d 155 (2d Cir. 1967), this Court affirmed, in an entirely different context, the decision in *Carroll v. American Federation of Musicians of the United States and Canada,* 241 F. Supp. 865 (U.S.D.C., S.D.N.Y., 1965) and the numerous internal union rules in that case which directly affected the employment status of employees. (See findings of fact 92, 93, 105, 106, 107, 114 and 127 at 241 F. Supp. at 879, 880 and 881 respectively.)

In view of the foregoing, and of other decisions such as *Glasser v. NLRB,* 395 F. 2d 401 (2nd Cir. 1968) which approve internal union rules directly affecting an employee's employment status, we ask this Court to resolve the apparent inconsistency between the circuits and within the Second Circuit and to settle the law.

The NLRB in its brief in opposition also relies on the dictum in *Scofield v. NLRB,* 394 U.S. at 429 which states that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced. . ." In so doing, the NLRB rests not on the holding but rather echoes the dissenting argument in *Allis-Chalmers,* 388 U.S. at 203 which was adopted by reference as the dissent in *Scofield,* 394 U.S. at 436.

The dissent by Mr. Justice Black in *Allis-Chalmers* presents precisely the position taken by the NLRB in this case, a position which can be argued in every union rule case, and therefore a position which, if accepted, will entirely vitiate the meaning as determined by this Court of the proviso to Section 8(b)(1)(A). The dissent in *Allis-Chalmers* reads in part: "Contrary to the Court, I am not at all certain that a union's right under the proviso to prescribe rules for the retention of

membership includes the right to restrain a member from working by trying him. . .and fining him for exercising his § 7 right of refusing to participate in a strike,. . .". 388 U.S. at 203.

This argument, that the union rule violates the policy of the law by frustrating an employee's Section 7 rights, is a refrain found in dissenting opinions, *IAM, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB 365, 369 (1970); *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67, 73 (1964); *Local 283, UAW (Wisconsin Motor Corp.)*, 145 NLRB 1097, 1107 (1964). As the NLRB has repeatedly recognized that: "In a sense, virtually all union rules affect a member's employment relationship." *Local 283, UAW (Wisconsin Motor Corp.)*, 145 NLRB at 1104; *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 NLRB at 70; *IAM, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB at 368 (1970), it can also be said that: "In a sense, virtually all union rules impinge on a member's statutory rights."

This Court has rejected the position of the dissenters and it appears to have construed the proviso to Section 8(b)(1)(A) differently from the NLRB and the court below in this case. This Court has found that an internal union rule, internally enforced, which deprives a union member of the opportunity to refrain from the concerted activity of a strike, so long as he remains a member, does not frustrate or invade an overriding policy of the labor law.

In this connection, we note that the brief in opposition to the petition wholly ignores a central point in this case, namely: that the decision of the court below appears to run directly counter to three fundamental policies set forth in the Federal laws as written by Congress and as expounded by decisions of this Court.

CONCLUSION

This case provides a vehicle to help define the law, resolve open questions, set to rest apparent decisional inconsistencies, and harmonize policies established by the Congress in the various Federal labor acts, basic policies which appear to be undermined by the decision below.

Respectfully submitted,

RALPH P. KATZ
DELSON & GORDON
230 Park Avenue
New York, New York 10169
(212) 661-9800

Counsel for Petitioner